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## The Nature of Juristic Paradigms Exploring the Theoretical and Conceptual Relationship Between Adversarialism and Therapeutic Jurisprudence

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# THE NATURE OF JURISTIC PARADIGMS: EXPLORING THE THEORETICAL AND CONCEPTUAL RELATIONSHIP BETWEEN ADVERSARIALISM AND THERAPEUTIC JURISPRUDENCE

NIGEL STOBBS\*

## ABSTRACT

*Problem solving courts appear to achieve outcomes which are not common in mainstream courts. There are increasing calls for the adoption of more “therapeutic” and “problem solving” practices by mainstream judges in civil and criminal courts in a number of jurisdictions, most notably in the United States and Australia. Currently, a judge who sets out to exercise a significant therapeutic function is quite likely to be doing so in a specialist court or jurisdiction, outside the mainstream court system, and, arguably, from outside the adversarial paradigm itself. To some extent, his work is tolerated but marginalized. But do therapeutic and problem solving functions have the potential to define, rather than complement, the role of judicial officers? The basic question addressed in this Article is, therefore, whether the judicial role could evolve to be not just less adversarial, but fundamentally non-adversarial. In other words, could we see—or are we seeing—a paradigm shift not just in the colloquial, casual sense of the word, but in the strong, worldview changing sense meant by Thomas Kuhn?*

## TABLE OF CONTENTS

I. INTRODUCTION .....	98
II. THE NATURE OF KUHNIAN PARADIGMS AND PARADIGM SHIFTS .....	101
A. <i>Paradigms and Worldviews</i> .....	107
B. <i>Paradigm Shift</i> .....	110
III. CAN JURISTIC MODELS/LEGAL SYSTEMS BE PARADIGMS IN THE KUHNIAN SENSE? .....	114

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A. <i>Juristic Models, Social Science and Ideology</i> .....	118
B. <i>Juristic Models as Paradigms</i> .....	125
IV. IS ADVERSARIALISM A PARADIGM? .....	127
V. IS THERAPEUTIC JURISPRUDENCE A PARADIGM? .....	131
VI. ARE ADVERSARIALISM AND THERAPEUTIC JURISPRUDENCE COMPETING PARADIGMS? .....	142
VII. CONCLUSION .....	148

## I. INTRODUCTION

Advocates and critics of therapeutic jurisprudence—and of many other vectors of what is variously referred to as “comprehensive law,” “holistic law,” “non-adversarial justice,” or “post-adversarial justice”—have long called for the integration and migration of their juristic techniques and principles from the variously described problem solving, problem-focused, solutions-focused, or simply “specialist” courts, into mainstream courts. The extent to which this is possible is uncertain and poses significant questions of law, practice, ethics, and jurisprudence.

If the current judicial functions of the mainstream judge are regulated primarily by constitutionally, legally, or ethically mandated adversarial principles, and if a more therapeutic role would not be, then this suggests the question whether a therapeutic role would be legitimate. More fundamentally, if adversarialism and therapeutic jurisprudence are—or are situated within—separate and competing theoretical *paradigms*, then, if we adopt the Kuhnian context, they are incompatible and the roles of judges within them are incommensurable. If each does not constitute, or sit within, a separate Kuhnian paradigm, then our basic task as researchers and practitioners is to work out if any elements of both are compatible. To determine whether this occurs, all that is required to bring therapeutic jurisprudence into the mainstream is some non-paradigmatic fine-tuning of the adversarial system or the creation of a hybrid paradigm. One could also assert, of course, that either therapeutic jurisprudence is fully commensurable with the adversarial paradigm or that the problem solving approach (of which therapeutic jurisprudence is a component) is not paradigmatic.

In this Article, I argue that law operates within a Kuhnian paradigm, that we can conceive of both an adversarial paradigm and a “post-adversarial” or “therapeutic” paradigm of law, and that therapeutic jurisprudence is conceptually sited with in this “post-adversarial” or “therapeutic” paradigm. Although I do not claim that therapeutic

jurisprudence itself constitutes a discrete juristic paradigm, a therapeutic focus most clearly characterizes this mooted “post-adversarial paradigm.” For that reason, I use the terms “post-adversarial paradigm” and “therapeutic paradigm” interchangeably. These are separate and competing paradigms, in the Kuhnian<sup>1</sup> sense, of what I refer to as “juristic models.”<sup>2</sup> The legal systems in some common law nations<sup>3</sup> are currently exhibiting many characteristics of a shift from an adversarial paradigm to a therapeutic paradigm.<sup>4</sup> The shift may be gradual and may not succeed, or it may involve migration to an as yet undefined hybrid or interdisciplinary paradigm.<sup>5</sup> Still, it is essential for researchers and legal practitioners to understand the nature of a paradigm shift, particularly when such a shift applies to juristic models and the functioning of the law. We need to consider what the implications of such a shift would entail for future reforms to the law, to legal institutions, legal practice, legal education, and to wider justice policy. A lack of such understanding will cause an overly reactive approach to legal practice and court reform.<sup>6</sup>

I am not suggesting here that therapeutic jurisprudence is a candidate for a comprehensive theoretical foundation of an entire legal system. Rather, I am exploring whether it could constitute a core element of an emerging post-adversarial approach to law. It could be the basis of an approach that places primary emphasis on finding workable solutions to

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1. As articulated by Kuhn in his seminal work. *See generally* THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (Univ. of Chi. Press 3d ed. 1996) (1962) [hereinafter KUHN, SCIENTIFIC REVOLUTIONS] (being revised and expanded upon in Kuhn’s later work and by social science researchers and legal theory scholars attempting to migrate the concept(s) to other disciplines).

2. By juristic model, I mean the theoretical framework on which the processes of civil and criminal litigation in courts are based. Those processes, which I suggest have a common theoretical basis, include at least legal and judicial reasoning, legal and judicial methodology, legal and judicial techniques, criminal and civil procedure, legal and judicial ethics, and legal epistemology.

3. These nations include, at least, the United States, Canada, Australia, and New Zealand.

4. More precisely, the law is moving from what Kuhn refers to as a period of normal science into a state of crisis.

5. There are a number of candidate alternative paradigms or hybrid paradigms to replace the adversarial model. Although, for the sake of exploring whether a shift to a therapeutic paradigm is possible, the assumption here is that it would be one predominantly consistent with the principles of therapeutic jurisprudence. This is not to say that other alternatives such as the mooted “ethic of care,” “solutions focused law,” or “comprehensive law” would not be as likely to characterize a new paradigm. It could be argued that therapeutic jurisprudence is an interdisciplinary paradigm given that some of its key methods involve data and practices adopted from other disciplines.

6. If the relationship between the two models is not conceived of as one of paradigm shift, then one risk is that the funding and resourcing of courts to engage in less adversarial processes will be seen as a non-core issue. Similarly, the level of professional and academic debate in the area is likely to be limited to largely pragmatic issues and the jurisprudential and doctrinal basis necessary to present therapeutic jurisprudence as part of a viable and fundamental alternative will be missed. To some extent, the debate is already being hijacked by overly pragmatic concerns.

problems rather than on formal legal resolutions or adjudications achieved via party-controlled proceedings overseen by a non-interventionist judge. As such, it would characterize a juristic model, paradigmatically different from the status quo. A Kuhnian-type paradigm shift to a therapeutic juristic model<sup>7</sup> would not entail the loss of adversarial principles or processes, or require that therapeutic jurisprudence explain and inform everything that happens in our legal institutions and legal relations. In fact, Thomas Kuhn continually emphasized that a new paradigm must retain virtually all of the replaced paradigm's ability to solve quantitative problems within a discipline.<sup>8</sup> What the old paradigm loses, in effect, is its qualitative and explanatory power.<sup>9</sup> Kuhnian paradigm shift is about the evolution of disciplines, not progress by the total rejection of the cumulative disciplinary matrix, which has developed over time.<sup>10</sup> Therefore, the objective of this Article is not to establish that a shift from an adversarial to a therapeutic paradigm would require the jettisoning of all, or even most, of the mechanisms of the current common law system. But it would perhaps require a fundamental change in the way we view the role of the courts in relation to a wider social and political worldview.<sup>11</sup>

There is also a danger—suggested by Rottman and others—that the long-term fate of therapeutic jurisprudence in the courts actually depends on its migration from the specialist courts to the larger “trial court system.” This risk is due in part to the reality that court administrators and funding providers are loathe to fragment operations, jurisdiction, and

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7. Note that when I refer to a “therapeutic juristic model,” I moot a juristic system which is significantly informed by the principles and practices of therapeutic jurisprudence, and in which adjudication simpliciter as the core function of the system is replaced by a more therapeutic function. I do not posit a model or paradigm in which therapeutic jurisprudence itself is either a panacea or self-contained rationale—nor is such a self-contained rationale necessary for paradigm status.

8. KUHN, *SCIENTIFIC REVOLUTIONS*, *supra* note 1, at 137.

9. Therapeutic jurisprudence is seen by many of its adherents as a lens which provides a different theoretical perspective on what the law, legal institutions, and legal actors ought to do.

10. Although the outcomes and achievements of practitioners within a discipline might be permanent, the theoretical positions which lead to those outcomes are not. It is only the number of explicable practices and methods that grow and evolve; there is no similar growth in the number of paradigmatic theoretical explanations for practices within the discipline. If there is a shift to a therapeutic paradigm, adversarial courts will still be recognized as having achieved their objectives to a large degree, but there is no guarantee that similar outcomes would be viewed as successful if they eventuated under the newer paradigm. THOMAS KUHN, *THE COPERNICAN REVOLUTION: PLANETARY ASTRONOMY IN THE DEVELOPMENT OF WESTERN THOUGHT* 264–65 (1957) [hereinafter KUHN, *COPERNICAN REVOLUTION*] (giving a more detailed explanation of how a new conceptual paradigm subsumes existing phenomena and outcomes, redefining them with examples from the natural sciences).

11. Or, as described later in this Article, *weltanschauung*. See also KUHN, *SCIENTIFIC REVOLUTIONS*, *supra* note 1, at 110–35.

resources into too many specialized divisions.<sup>12</sup> Freiberg foreshadows the fate of what he conceived of as “therapeutic jurisprudence courts” in a scenario where some level of paradigm change is not forthcoming:

If the courts prove too expensive, they will eventually lose their privileged status and will have to compete with the next “vogue.” They may soon, or eventually, run out of judicial officers to staff them. Unless there is a *significant culture change* in the judiciary, a posting in the therapeutic jurisdiction will be seen as a form of punishment or as a place to put those who are seen as a bit “soft.” There can be nothing worse for such courts than having a rapid succession of reluctant and unsympathetic judges or magistrates.<sup>13</sup>

The reality faced by a number of less adversarial courts and tribunals is that they are, as Freiberg fears, finding it difficult to find sufficient numbers of appropriately trained and committed judicial officers. This had led to a situation in which some problem solving or solutions-focused courts are expected to meet higher standards, and achieve better and faster outcomes, than their mainstream equivalents.<sup>14</sup>

## II. THE NATURE OF KUHNIAN PARADIGMS AND PARADIGM SHIFTS

The concept of a paradigm is used often in academic writing across a wide range of disciplines, and with a number of meanings.<sup>15</sup> In most such instances, what seems to be meant by a “paradigm” is not just some colloquial concept, but a theoretical framework which forms the defining core (or the set of “exemplars”) of a discipline, in the sense postulated by Kuhn.<sup>16</sup> A key reason for the popularity of Kuhn’s work is that it seems to give some support and vocabulary to academics and researchers who are

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12. David Rottman, *Does Effective Therapeutic Jurisprudence Require Specialized Courts (and Do Specialized Courts Imply Specialist Judges)?*, 37 CT. REV. 22, 24 (2000).

13. Arie Freiberg, *Therapeutic Jurisprudence in Australia: Paradigm Shift or Pragmatic Incrementalism?*, 20 LAW IN CONT. 6, 19 (2003).

14. See, e.g., Nigel Stobbs & Geraldine Mackenzie, *Evaluating the Performance of Indigenous Sentencing Courts*, 13(2) AUSTL. INDIGENOUS L. REV. 90 (2009) (concluding that Indigenous sentencing courts in a number of Australian jurisdictions are evaluated by policymakers and funding providers according to stricter criteria than their mainstream equivalents).

15. See generally William W. Cobern & Cathleen C. Loving, *Invoking Thomas Kuhn: What Citation Analysis Reveals about Science Education*, 9 SCI. & ED. 187 (2000) (quantifying citation of Kuhn across disciplines, including education, law, sociology, linguistics, political science, economics, marketing, and psychology).

16. KUHN, SCIENTIFIC REVOLUTIONS, *supra* note 1, at 10 (defining paradigms as novel achievements supplying the basis for future scientific practice that draw adherents away from prior modes of scientific inquiry and leave unresolved many problems for the new practitioners).

rebellious against tradition.<sup>17</sup> For that reason, adherents to innovative or alternative challenges to orthodoxy often tend to talk about the need for paradigm *shift*.

Many versions of, or references to, the paradigm phenomenon in academia seem to lack analytical or conceptual depth and are occasionally vague to the point of being colloquial. According to Kuhn, “[a] paradigm is what the members of a scientific community, and they alone, share.”<sup>18</sup> This means that the paradigm is discipline-specific and unique to that particular discipline.<sup>19</sup> For example, an adversarial system of litigation, if it is a paradigm, is something different from any other “adversarial system” or other system of litigation. Since a paradigm is discipline-specific and unique, it is also exclusive of any other proposed paradigm. Kuhn suggested that the canonical literature, methodologies, and practices of a paradigm serve for a time to implicitly “define the legitimate problems and methods of a research field for succeeding generations of practitioners.”<sup>20</sup> And paradigms have done this, Kuhn observes, because they share two essential characteristics: “[t]heir achievement was sufficiently unprecedented to attract an enduring group of adherents away from competing modes of scientific activity. Simultaneously, it was sufficiently open-ended to leave all sorts of problems for the redefined group of practitioners to resolve.”<sup>21</sup>

According to Kuhn, most of the so-called theoretical research related to a discipline is really just a process of fine-tuning the blueprint of the field. This fine-tuning involves puzzle solving. Kuhn deliberately avoids calling it problem solving because the finding of a solution is basically guaranteed

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17. KUHN, *COPERNICAN REVOLUTION*, *supra* note 10, at 191. Kuhn’s view is that theories are comprehensive models of reality which give meaning to facts or observations. A theory operates to retrospectively explain a system; it is not a natural outcome of the system or observations. This means that we would see a science, or in this case, “the legal system,” as a succession of self-contained paradigms that operate to serve the needs of the community rather than as a series of gradually more accurate approximations of what the legal system ought to be in order to be closer to an ideal or truth.

18. THOMAS KUHN, *THE ESSENTIAL TENSION: SELECTED STUDIES IN SCIENTIFIC TRADITION AND CHANGE* 294 (1977).

19. The Macquarie Dictionary gives a useful definition of “paradigm” that captures the sense in which it is used in this article: “A set of assumptions, concepts, values, and practices that constitutes a way of viewing reality for the community that shares them, especially in an intellectual discipline.” *Paradigm*, [http://www.macquariedictionary.com.au/ezp01.library.qut.edu.au/131.181.0.0.16@\\_929FF8\\_44268244/-/p/thes/article\\_display.html?type=title&first=1&mid=3&last=3&current=1&result=1&DatabaseList=dictbigmac&query=paradigm&searchType=findrank](http://www.macquariedictionary.com.au/ezp01.library.qut.edu.au/131.181.0.0.16@_929FF8_44268244/-/p/thes/article_display.html?type=title&first=1&mid=3&last=3&current=1&result=1&DatabaseList=dictbigmac&query=paradigm&searchType=findrank) (last visited Nov. 16, 2011).

20. KUHN, *SCIENTIFIC REVOLUTIONS*, *supra* note 1, at 10 (referring frequently to those who work in a particular science or discipline as “practitioners,” a protocol which will be followed here).

21. *Id.* at 10, 10–22 (using the terms “science” and “discipline” interchangeably, and using the terms “scientist” and “practitioner” interchangeably, both of which are consistent with the attempt to apply Kuhnian concepts to disciplines other than the natural sciences).

within the parameters of the current paradigm.<sup>22</sup> It is just a matter of moving the pieces around according to the existing paradigmatic method. A puzzle solving practitioner is not working in completely uncharted territory. For example, a judge sentencing a drug offender in a mainstream court tries to construct the appropriate penalty based on precedent and legislative principles. The judge is not generally expected to design a judicially supervised program in which lawyers, judges, and service providers act as a team to address and resolve the offender's substance abuse. The latter function is not a puzzle solving duty that can be informed by the usual principles of sentencing.<sup>23</sup>

Kuhn rejects the image of the lone scientific or academic revolutionary who turns orthodox worldviews on their heads. Most scientists and practitioners of a discipline are narrowly trained experts who focus on solving the puzzles until too many anomalies appear. Once too many such anomalies appear, then the paradigm is in crisis. Only at that point will there be a legitimate normative discourse about the future direction of the field.<sup>24</sup> The paradigm moves from crisis to revolution when a viable alternative paradigm is found to unite the revolutionary threads that have arisen in response to the crisis.<sup>25</sup> Therefore, we do not see any demarcation lines where one paradigm ends and another emerges. Fuller concludes that "[i]n practice, this means that an intergenerational shift occurs, whereby new scientific recruits are presented with a history that has been rewritten to make the new paradigm look like the logical outgrowth of all prior research in the field."<sup>26</sup>

Indeed, when it comes to therapeutic jurisprudence, this process is already visible in calls for morphing existing mainstream courts from adjudication to problem solving tribunals. Practitioners within a discipline need to see themselves as more than just appliers of a particular puzzle solving method. They are prepared by their educators and mentors to

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22. KUHN, *SCIENTIFIC REVOLUTIONS*, *supra* note 1, at 36–37.

23. During a period of normal science, a cumulative body of knowledge and precedent develops, but the cumulative pool is of little use to the practitioner facing novel problems which appear anomalous under the existing paradigm. So a mainstream judge who was expected, as his primary duty, to promote change in an offender, would represent an anomaly and contribute to a crisis within the discipline.

24. This is how I characterize the current relationship between adversarialism and therapeutic jurisprudence in this Article. The therapeutic jurisprudence literature indisputably represents an extensive normative discourse about the future of the legal system.

25. KUHN, *SCIENTIFIC REVOLUTIONS*, *supra* note 1, at 84.

26. STEVEN FULLER, *KUHN VS POPPER: THE STRUGGLE FOR THE SOUL OF SOCIAL SCIENCE* 20 (2003).



contribute to the completion of the worldview assumed by their current paradigm.

Kuhn held that an epistemological paradigm shift<sup>27</sup> occurs when sufficient anomalies arise that cannot be explained by the existing paradigm. A shift to a therapeutic paradigm, therefore, could occur at the point where the adversarial paradigm is no longer able to cope with the number of anomalous practices occurring in the courts. There are a number of non-adversarial practices currently appearing in mainstream civil and criminal courts, but they are not widespread enough to constitute a paradigm shift. Instead, they may be indicative of what Kuhn referred to as evidence of a crisis within the discipline, which may lead to a revolution.<sup>28</sup> A revolution within a discipline is not, according to Kuhn, a dispute between an obviously correct group on one side and an obviously mistaken group on the other.<sup>29</sup> This is the case because the paradigm itself is in dispute. Since the paradigm provides the only method accepted by the discipline for resolving disagreements about the meaning of data, results, or methods, a quick and objective judgment about which paradigm should succeed is impossible.<sup>30</sup>

This revolutionary period in the discipline is more akin to the pre-paradigmatic phase in the early days of a science or discipline than to a period of normal science.<sup>31</sup> In the pre-paradigmatic phase the “fundamentals are in question, there are meaningful possibilities of fundamental novelty, there is a lack of focus and a sense of casting about within the community.”<sup>32</sup> It could well be, however, that the genesis of the legal system as a fundamentally pragmatic institution implies that there

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27. Kuhn popularized the epistemological paradigm shift as “a scientific revolution.” The shift is epistemological because the fundamental change is about what we consider to be the core knowledge of the system.

28. See, e.g., Diana Bryant & John Faulks, *The “Helping Court” Comes Full Circle: The Application and Use of Therapeutic Jurisprudence in the Family Court of Australia*, 17 J. JUD. ADMIN. 93 (2007) (describing the policies and practices supported by principles of therapeutic jurisprudence that have been adopted over the past thirty years by the Family Court of Australia).

29. KUHN, SCIENTIFIC REVOLUTIONS, *supra* note 1, at 148–50.

30. For example, a disagreement about the relative effectiveness of a particular court which has a high clearance rate and low appeal rate for criminal matters, but which seems to have negligible effect on recidivism rates, or in addressing the underlying causes of individual offending in the community within which it operates, cannot really be objectively settled at the moment according to the position taken in this Article, because the adversarial paradigm is under dispute.

31. But in the revolutionary stage there is no returning to a pre-paradigmatic stage which involves some sense of starting completely afresh and redefining the whole discipline. This is obviously always going to be the case with something as entrenched as the juristic model which is so intimately linked with other major public institutions.

32. RUPERT READ & WES SHARROCK, KUHN: PHILOSOPHER OF SCIENTIFIC REVOLUTION 46 (2002).

was no real pre-paradigmatic phase. The adversarial system was a practical means of adjudicating disputes long before it developed coherent jurisprudential underpinnings.<sup>33</sup>

Revolutions within an academic discipline that lead to paradigmatic change are not quick, clearly defined, and conceptually neat. The analogy simply reminds us that the debate or conflict between advocates of a theoretical status quo and their revolutionary counterparts cannot be resolved by a neutral and authoritative adjudicator. Indeed, it may not even be obvious that there are distinct groups of opposed individuals. In a revolutionary phase, where members of the judiciary, the legal academy, the legal profession, and government policy makers are split as to the future of adversarialism as the dominant paradigm, there is nobody left to referee. All have a vested interest and, according to Kuhn, a paradigm shift is only fully recognized in a historical sense.<sup>34</sup> To those operating within a paradigm during a period of normal science, the current paradigm will appear to be the culmination of all that came before it rather than as a split with the past.

Kuhn asserts that, unlike a political revolution, a revolution in an academic discipline is not ultimately a matter of individual choice.<sup>35</sup> Although individual practitioners can and do change perspectives, a paradigm shift is not fundamentally driven by individuals changing allegiances or being convinced that the new paradigm is preferable. In fact, many practitioners never switch sides at all. The groundswell of change needed to truly shift a paradigm comes from those who are trained in the new paradigm and shape their careers according to it.<sup>36</sup> Those who do drive innovation are not likely to be changing allegiances or worldviews; they are likely to have never been committed to the orthodox paradigm in the first place.

Kuhn contends that debate will abound during a revolutionary phase, but that the new paradigm succeeds because those who adopt it are systemically influential and end up dominating the academic discourse and indoctrinating the new generation of practitioners with the new

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33. See, e.g., John Hudson, *Court Cases and Legal Arguments in England c.1066-1166*, in 10 *TRANSACTIONS OF THE ROYAL HISTORICAL SOCIETY, SIXTH SERIES* 91 (Royal Hist. Soc'y ed., 2000).

34. KUHN, *SCIENTIFIC REVOLUTIONS*, *supra* note 1, at 7.

35. *Id.* at 111–35.

36. Kuhn often cites Max Planck's observation that "a new scientific truth does not triumph by convincing its opponents and making them see the light, but rather because its opponents eventually die, and a new generation grows up that is familiar with it." *Id.* at 150 (quoting PLANCK, *infra* note 158, at 33–34).

paradigm.<sup>37</sup> Furthermore, Kuhn was skeptical of the extent to which debates during a paradigm shift involved actual and direct, rational disagreement and not disputes involving talking over each other, arguing in circles, and begging the question.<sup>38</sup> For example, it is hard to find common ground about an argument that a particular practice ought to be reformed on the grounds that it has anti-therapeutic consequences if the other party disputes the meaningfulness of the “anti-therapeutic” descriptor. This phenomenon is illustrated by the critique of Roderick and Krumholz, who assert that:

[T]herapeutic jurisprudence, as a “school of social enquiry” must establish specific and precise conceptual and theoretical constructs prior to the application of its principles to “therapeutic” movements in the criminal justice and overall legal systems. One cannot ascertain the benefits of problem-solving courts or therapeutic lawyering techniques if one has not established the validity of therapeutic jurisprudence as a theoretical construct.<sup>39</sup>

This sense of arguing from the basis of different core constructs is compounded when one considers that some therapeutic jurisprudence scholars and practitioners retreat from the suggestion that therapeutic jurisprudence is somehow a “theory” or that it contains “theoretical constructs.” Similarly, in response to Krumholz and Roderick, it could be argued that there is no coherent or systematic attempt to “establish specific and precise conceptual and theoretical constructs prior to the application of its principles” in relation to the adversarial paradigm.<sup>40</sup> The adversarial system of litigation seems to have developed according to pragmatic imperatives rather than as the manifestation of some carefully considered theoretical position. Such debates, based on mutual assertions of a lack of precise *conceptual and theoretical constructs*, appear to be exactly what Kuhn suggests characterize the revolutionary stage that occurs during a paradigm shift.

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37. This is a key theme throughout *The Structure of Scientific Revolutions*, and Kuhn revisits it in the 1969 postscript. KUHN, *SCIENTIFIC REVOLUTIONS*, *supra* note 1, at 174–210.

38. *Id.* at 94.

39. Susan Krumholz & Dennis Roderick, *Much Ado About Nothing? A Critical Examination of Therapeutic Jurisprudence*, 1 S. NEW ENG. ROUNDTABLE SYMP. L.J. 201, 205 (2006).

40. *Id.*

*A. Paradigms and Worldviews*

A paradigm is more than just the currently dominant set of exemplars underpinning a discipline—it is a reflection of a particular worldview within which that exemplary framework connects to other disciplines and other types of human experience—from which it draws its normative force. Given the interrelatedness and symbiotic nature of the relationship between the legal system and other liberal institutions of governance, there is little point in trying to conceive of a legal paradigm being a standalone phenomenon.

Social science has enthusiastically adopted the relationship between a paradigm and a worldview. In the relevant literature, the nature of a worldview is often discussed by reference to the *weltanschauung*: the fundamental cognitive orientation of an individual or society encompassing natural philosophy, “fundamental existential and normative postulates or themes, values, emotions, and ethics.”<sup>41</sup> This can be more simply expressed as the set of experiences, beliefs, and values that affect the way an individual or community perceives and responds to reality. In the social sciences, and in some jurisprudential research, paradigm shifts in a particular discipline are said to be inevitably related to shifts in how a community or society organizes and understands reality.

Since multiple paradigms within a given discipline would be, by definition, incompatible, one must be dominant at any given time. According to scholars such as Handa, a dominant paradigm is usually recognized by reference to a number of essential characteristics.<sup>42</sup> These might include an increasing recognition by academic and professional bodies and an increasing body of journal articles which assume a basic knowledge of the principles of the paradigm, including iconic and charismatic leaders and proponents who inspire conversation, conferences and symposiums centering on analysis and application of the paradigm. This has led to the penetration of the paradigm into university syllabi and professional admission requirements.

The adversarial paradigm is grounded in a long-established political and economic liberal worldview. This worldview holds that personal liberty and well-being are best obtained and maintained by competition,

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41. GARY PALMER, TOWARD A THEORY OF CULTURAL LINGUISTICS 114 (1996) (internal citations omitted).

42. M.L. Handa, Paper presented at the International Symposium on Science, Technology and Development (Mar. 20–25, 1986).

freedom to contract, and the enforcement of personal rights as the primary means of dispute resolution and of promoting social cohesion.

Within this worldview, some scholars argue that legal adversarialism and a culture of conflict have become seen as not only endemic but as paradigmatic, to the extent that to question them is to attack the very core of modern liberal society.<sup>43</sup> Karlberg articulates it in this way: “[A]dversarialism has become the predominant strand in contemporary western-liberal societies. Throughout the contemporary public sphere, competitive and conflictual practices have become institutionalized norms . . . [B]ecause of this it is often difficult for people to envision alternatives . . .”<sup>44</sup> “[A] proper accounting should reveal that while oppositional strategies have reached a point of diminishing returns, non-adversarial strategies are emerging as the most effective methods for lasting social change in an age of *heightened social and ecological interdependence*.”<sup>45</sup> This worldview manifests itself in the legal system, asserts Karlberg, due to the prevalence of a “normative adversarialism”—the assumption that contests are “normal and necessary models of social organization.”<sup>46</sup>

Similarly, Anand argues that a liberal *Weltanschauung* underpins the adversarial legal system to such an extent that no sense can be made of it outside of the traditional liberalist political philosophy. He further argues that the assumption is that the liberal political order, with its almost exclusive focus on the rights and liberties of the individual as the benchmark for human flourishing, is the most natural for human societies.<sup>47</sup> Because it is the most natural, it assumes an aura of inevitability.

The depth of concern that some judicial critics have about the extent to which therapeutic jurisprudence purportedly diverges from liberal principles is evident in this statement from United States District Court Judge Morris Hoffman:

If therapeutic jurisprudence were just a trendy idea that did not work, we could let it die a natural death. But it is not just trendy and ineffective, it is profoundly dangerous. Its very axioms depend on

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43. See generally MICHAEL KARLBERG, *BEYOND THE CULTURE OF CONTEST: FROM ADVERSARIALISM TO MUTUALISM IN AN AGE OF INTERDEPENDENCE* (2004) (analyzing the relationship between legal adversarialism and laissez-faire liberal worldviews).

44. *Id.* at xvi.

45. *Id.* at 183–84 (emphasis added).

46. *Id.* at 36.

47. Rakesh Anand, *Legal Ethics, Jurisprudence, and The Cultural Study of The Lawyer*, 81 TEMPLE L. REV. 737, 759 (2008).

the rejection of fundamental constitutional principles that have protected us for 200 years. Those constitutional principles, based on our founders' profound mistrust of government, and including the commands that judges must be fiercely independent, and that the three branches of government remain scrupulously separate, are being jettisoned for what we are led to believe is an entirely new approach to punishment.<sup>48</sup>

The strength of Judge Hoffman's rebuke is evidence, perhaps, of the perceived threat to the liberal worldview. Does therapeutic jurisprudence really advocate the jettisoning of these constitutional principles?

Anand points out that a liberal worldview is contingent rather than inevitable and that the sort of social and political framework for legal thought developed by the social contractarian scholars in early jurisprudence, such as Rawls, is far less compelling now than in their day:

A particular *Weltanschauung* speaks to a specific understanding about the nature of man, the nature of the world. . . . As the term itself implies, and as is perhaps immediately evident, a particular worldview is both historically and culturally contingent in character. . . .

. . . .

. . . [L]iberalism begins with a belief in the primacy of the individual and in the goodness and inevitability of change. It is only within the context of this *Weltanschauung* that one can really take hold of liberalism's various arguments and claims. For example [liberal legal and political philosophy] . . . is intelligible only if one *assumes* the liberal commitment to the individual as a truly autonomous subject and an accompanying political theoretic idealism.<sup>49</sup>

Kuhn alludes to the role of ideology in shaping scientific paradigms by considering that when a practitioner of a particular discipline begins to practice pursuant to a new paradigm, he must learn to see a new gestalt. Some of his current practices will seem incommensurable with his prior

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48. Morris Hoffman, *Therapeutic Jurisprudence, Neo-Rehabilitationism, and Judicial Collectivism: The Least Dangerous Branch Becomes Most Dangerous*, 29 FORDHAM URB. L.J. 2063, 2071–72 (2002).

49. Anand, *supra* note 47, at 754–55 (emphasis added) (footnotes omitted). As will be discussed below, the most trenchant liberalist criticism of therapeutic jurisprudence tends to come from members of the U.S. judiciary who take quite conservative views of the constitutional limits of the judicial role.

practices despite the fact that the world “outside of the sense data” has not changed.<sup>50</sup>

There is no doubt that the common law judicial system is mired in liberal ideology. There has always been a desire among social scientists to portray and define their fields as mature disciplines akin to the natural sciences. It is common to see them characterized as being currently involved in some sort of paradigm shifting phase where there is a struggle between whatever theoretical forces are currently published in that discipline’s journals.<sup>51</sup> In many instances, these competing theoretical forces are ideologically driven. The problem with ideologically driven theory in the social sciences and their associated professional disciplines is that the ideologies—according to Kuhn—claim to represent not just orthodoxy, but also truth.<sup>52</sup> For that reason, their methodologies, models, and techniques are based on an assumption of validity: It is only the results and data which may be suspect. According to Kuhn, science involves methods, models, and conjectures, which are always tentative.

The upshot of this analysis is that in a discipline (such as law) based on ideology, those who suggest or advocate for a paradigm shift may become politically powerful but are condemned to be rationally and instrumentally impotent. Without a shift in ideology, paradigms cannot shift.<sup>53</sup>

### *B. Paradigm Shift*

Kuhn states that all paradigms are faced with anomalies, but that these are usually dealt with as acceptable levels of error or just marginalized, rejected out of hand, or ignored.<sup>54</sup> But the significance of anomalies varies

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50. KUHN, *SCIENTIFIC REVOLUTIONS*, *supra* note 1, at 111–12.

51. Both Kuhn and Popper would classify the social science disciplines as being in the pre-science stages.

52. This criticism is often leveled at both the practice of law and jurisprudence. Law operates within a fairly precisely defined frame of reference and the traditional, adversarial lawyer will typically first determine whether the law is actually relevant to a client’s problem, then determine what meaning the law assigns to the client’s situation. *See* WILLIAM CHAMBLISS & ROBERT SEIDMAN, *LAW, ORDER AND POWER* 3 (1971) (“[T]he prescriptions of the American Constitution, the common law, and the statutes are descriptions of the real world . . . . The central myth . . . is that the normative structures of the written law represent the actual operation of the legal order.”) (crystallizing the early sociological view of the law and jurisprudence of the time by asserting that jurists assume).

53. There is no doubt that there is a clear distinction between an ideological focus of the law as due process and individual rights, on one hand, and with the wellbeing of litigants and the resolution of problems and healing of relationships, on the other. Therapeutic jurisprudence advocates are often at pains to suggest that “rights trump therapy” where there is a clear conflict. If true, this assertion seems to be more of an attempt to assuage the concerns of the legal majority rather than an attempt to attain theoretical legitimacy.

54. KUHN, *SCIENTIFIC REVOLUTIONS*, *supra* note 1, at 62.

between practitioners within a discipline. It is unclear whether the majority of mainstream judges and jurists treat therapeutic courts and problem solving courts as anomalies that are outside the “real” court system or as mistaken applications of policy, in effect as acceptable levels of error. That would allow at least some of these courts to exist without being perceived as an unacceptable ideological indulgence or as a threat to the liberal, adversarial paradigm.

It could be that the continuation of an adversarial paradigm requires no particular awareness of any alternative. The acceptance and promotion of a paradigm at an individual level does not require that the individual be well-versed in the underlying orthodoxy of the paradigm. In fact, the relationship between paradigms and worldviews invites either a non-critical meta-perspective or acceptance of the paradigm as a default position. It would not be surprising to hear judges or lawyers declare that they do not operate within any particular theoretical paradigm or from any specific worldview. As Northrop explains:

To be sure, there are lawyers, judges and even law professors who tell us that they have no legal philosophy. In law, as in other things, we shall find that the only difference between a person “without a philosophy” and someone with a philosophy is that the latter knows what his philosophy is, and is, therefore, more able to make clear and justify the premises that are implicit in his statement of the facts of his experience and his judgment about those facts.<sup>55</sup>

Lawyers and judges educated without reference to any overt theoretical perspective may react skeptically to theoretical discussion in general and make the invalid assumption that the practice of law is a purely pragmatic affair.<sup>56</sup>

Students become scientists or practitioners when they are socialized by the academy into accepting four characteristics of the current paradigm. These characteristics are:

- (1) A set of shared symbolic generalizations;
- (2) A common model of reality;

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55. FILMER NORTHROP, *THE COMPLEXITY OF LEGAL AND ETHICAL EXPERIENCE* 6 (1959).

56. It is worth noting that, although the profession of lawyer in the English common law system is over 500 years old, it was not until the end of the 1800s that legal education became available as university level study. See Ralph Michael Stein, *The Path of Legal Education from Edward I to Langdell: A History of Insular Reaction*, 57 CHI.-KENT L. REV. 429 (1981) (tracing the history of the legal profession from 1292 forward). Prior to that, it was undertaken pursuant to an apprenticeship or indenturing scheme, which continues to some extent today with the articulated clerk process.



- (3) Shared values as to standards and legitimate procedures; and
- (4) Shared exemplars in the form of concrete problem solutions typical of the approach of the relevant scientific/academic community.<sup>57</sup>

When a new paradigm is established, the practitioners act as though the new worldview is reality, an attitude bordering on dogmatism. It is in this context that the period of normal science, involving mostly puzzle solving, takes place. Kuhn acknowledged that the pursuit of this normal science might inhibit some doubt and originality from the work of the typical practitioner, but that this freed them up to dispense with questions of definition and philosophical assumptions and focus on puzzle solving. This is likely the environment in which many lawyers and judges prefer to work. They may accept that particular laws are tentative, but prefer to assume that the theoretical adversarial framework is inviolate. When a paradigm is truly entrenched, it is resistant to fads and transitory radical perspectives that could derail it. As observed earlier, competing paradigms are incommensurable—meaning that we cannot comprehend a new paradigm by application of the terminology and the theoretical framework of the old paradigm because, in some sense, when paradigms change, the world changes with them.

To paraphrase and apply Kuhn's strongest position, advocates for competing juristic paradigms could not fully comprehend the other's perspective because they are observing elements of a literally different legal and social world. Kuhn would assert three supporting hypotheses for this conclusion:

- (1) Proponents of competing juristic paradigms will often disagree about the list of problems that any candidate for paradigm must resolve.<sup>58</sup>
- (2) The vocabulary and problem solving methods that an existing paradigm and a new contender utilize may have some similar terms and elements, but within the new paradigm, old terms, concepts, and experiments fall into new relationships with each other. They form a new conceptual web.<sup>59</sup>

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57. KUHN, SCIENTIFIC REVOLUTIONS, *supra* note 1, at 168–73. See generally *id.* at 174–210.

58. *Id.* at 148.

59. *Id.* at 149.

(3) The advocates of different juristic paradigms practice their trades in different worlds because of their legal and academic training and prior experience as legal practitioners.<sup>60</sup>

This position is sometimes criticized as being radically relativistic, that it would mean that we cannot make a rational choice between competing paradigms if there is no common descriptive or theoretical basis by which to compare them.

Few proponents of any post-adversarial or therapeutic practice would accept that they cannot understand the adversarial perspective and vice-versa. In the postscript to the Third edition of *The Structure of Scientific Revolutions*, Kuhn rebuts this criticism. He points out that, regardless of the content of a disciplinary paradigm, practitioners within other fields, intelligent readers, or academics in general ought to be able to recognize both the observable data that is claimed to underpin the principles of the paradigm and to assess its logical structure according to some meta-paradigm.<sup>61</sup> In that sense, there is some process or set of holistic benchmarks external to individual paradigms by which they can be validated or invalidated in terms of their claims *to be a paradigm*. We need not be limited to the claim that any particular paradigm is right or wrong, according to criteria unique to that paradigm or any other.

So, even if we were to go so far as to say that adversarialism and therapeutic jurisprudence have different and incompatible languages and theoretical frameworks, assessments could still be made by people outside of either paradigm about their relative strengths. This seems to be a reasonable position if we accept the nature of the relationship between a disciplinary paradigm and a wider worldview. And that is the position that seems to have gained general acceptance in the post-Kuhnian literature. For instance, Meynell explains:

To *understand* a paradigm which is a rival to the one held by oneself is to apprehend how it accounts for a *certain amount* of observable evidence; not to *accept* a paradigm which one understands is to believe that there is *other* evidence which tells against it, that this evidence supports another paradigm, and that this other paradigm explains at least a high proportion of the observable evidence explained by the first.<sup>62</sup>

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60. *Id.* at 150.

61. *Id.* at 199.

62. Hugo Meynell, *Science, the Truth, and Thomas Kuhn*, 84 MIND 79, 85 (1975) (emphasis added).

If we accept Meynell's analysis, it is not possible for practitioners within each competing paradigm to engage in a true comparative discourse because the principles they have learned have been acquired by the use of exemplars, rather than by the use of suitably analytical definitions. This gap cannot be closed by using some common or neutral language, although each ought to be able to at least realize that the other has the status of a paradigm. That is not to say that debate or discussion between advocates is useless or a non sequitur, but that a shift between the paradigms will not occur as a result of the *content* of such debate.

### III. CAN JURISTIC MODELS/LEGAL SYSTEMS BE PARADIGMS IN THE KUHNIAN SENSE?

In order to determine whether adversarialism and therapeutic jurisprudence are competing paradigms, we need to determine whether each is, in fact, a paradigm and, if so, what each is paradigmatic of.<sup>63</sup> Before deciding whether each may count as a paradigm, this section of the Article posits that we can conceive of a structure that will be referred to as a "juristic model," which lends itself to paradigmatic status.

As a precursor to considering whether we can conceive of these concepts as forming discrete paradigms, we would need to delineate with some clarity what is meant by concepts such as "the law," "the legal system," "the justice system," and other general descriptions of those institutions to which researchers and practitioners suggest that therapeutic jurisprudence principles might apply in a wider sense. There is a pervasive element of vagueness in the way these concepts are dealt with and articulated in the literature which is perhaps reflective of the allegations of vagueness and indeterminacy sometimes leveled at the therapeutic jurisprudence movement itself.

For example, Freiberg conceives of therapeutic jurisprudence as applying to entities variously described as "the wider judicial and correctional system," "the criminal justice system," "court practices," "traditional institutions of criminal justice," "court system," "the courts,"

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63. Remember that, for the purposes of this Article, I am suggesting that for the sake of a Kuhnian analysis we grant that it is possible to conceive of therapeutic jurisprudence as a discrete juristic model, and hence as a paradigm on which to base a wider legal system. Few scholars would adopt this position, but we can also conceive of a therapeutic paradigm which, although intimately informed by therapeutic jurisprudence principles, is much broader in scope. Delineating and precisely articulating this broader paradigm is beyond the scope of this Article and, as observed earlier, is most recently referred to as "post-adversarial" or "trans-adversarial." For the sake of the analysis in this Article, either conception will do.

“the general court structure,” “broader judicial enterprise,” and “larger trial court systems.”<sup>64</sup> Without attempting much analysis of the nature of a paradigm or what adversarialism is actually a paradigm of, Freiberg asserts that:

[R]ecent changes to court practices manifested in drug courts, domestic violence courts, mental health courts and Koorie courts can be generalised to the wider judicial and correctional system through an understanding of the key features of problem-oriented courts and the theory of therapeutic jurisprudence. It argues further that therapeutic jurisprudence and restorative justice have in common a recognition of the importance of factors such as trust, procedural fairness, emotional intelligence and relational interaction which, if applied more broadly, can provide a constructive alternative to the flawed adversarial paradigm which presently dominates the criminal justice system.<sup>65</sup>

This sort of representation of the relationship between therapeutic jurisprudence, restorative justice, and other vectors of what Daicoff refers to as the “Comprehensive Law Movement”<sup>66</sup> on the one hand, and adversarialism on the other, is relatively common in the literature.<sup>67</sup> It contains three assumptions that need to be addressed. First, that adversarialism constitutes a paradigm. Second, that this adversarial paradigm is flawed. Third, that therapeutic jurisprudence<sup>68</sup> is an alternative (and arguably superior<sup>69</sup>) paradigm.

The process of positing, unpacking, and challenging these assumptions in the context of a more rigorous Kuhnian process should provide some useful insights. It is important to keep in mind that to conceive of something as a paradigm does not entail an assertion that it is a complete

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64. See generally Freiberg, *supra* note 13, at 6–7, 18–20.

65. *Id.* at 7. A few years later, Freiberg seems to have broadened his scope somewhat by suggesting the emergence of a “nonadversarial paradigm.” See generally Arie Freiberg, *Non-Adversarial Approaches to Criminal Justice*, 16 J. JUD. ADMIN. 205 (2007).

66. Susan Daicoff, *Law as a Healing Profession: The “Comprehensive Law Movement,”* 6 PEPP. DISP. RESOL. L.J. 1, 1 (2006).

67. See also Susan Daicoff, *Growing Pains: The Integration vs. Specialization Question for Therapeutic Jurisprudence and Other Comprehensive Law Approaches*, 30 T. JEFFERSON L. REV. 551, 551–53 (2008); Warren Brookbanks, *Therapeutic Jurisprudence: Conceiving an Ethical Framework*, 8 J.L. & MED. 328, 329 (2001); David Wexler, *Reflections on the Scope of Therapeutic Jurisprudence*, 1 PSYCHOL. PUB. POL’Y & L. 220, 220–21 (1995).

68. Freiberg obviously conceives of therapeutic jurisprudence in this statement as part of a wider and more holistic approach to “law,” and this issue is dealt with in more detail below.

69. This Article considers therapeutic jurisprudence as an incommensurable, not superior, therapeutic paradigm.

system of theory or practice. A shift in paradigm entails a shift in the core focus and values of a discipline, which generates new exemplars for testing new theories and practices within a discipline. Much, and even the majority, of what is done in the replaced paradigm may be retained. It is important to note this in order to avoid the error that therapeutic jurisprudence is not some sort of cult, panacea, or substitute for rigorous analysis of facts and law, or an end in itself.<sup>70</sup> Perhaps a paradigm shift could even be characterized by a process as simple and broad as the law being fundamentally concerned with either refereeing a dispute between parties to decide a winner based on accepted procedural rules or being fundamentally concerned with seeing itself as a social force potentially enhancing or inhibiting therapeutic outcomes. To accept the latter as a fundamental focus would not entail losing all the adversarial qualities of the former, but it would entail a therapeutic filter applied to all legal processes *a priori*.<sup>71</sup>

There is no doubting the broad application of therapeutic principles across the spectrum of legal fields and practices. It is virtually *de rigueur* in contemporary therapeutic jurisprudence scholarship to note that what was once an approach to the reform of mental health law and practice has broadened into many other areas of law and to list a whole host of those areas. In an early paper on the scope of therapeutic jurisprudence, Wexler comments on this potential for expansion when he asks:

Once one starts approaching legal areas with the use of the therapeutic jurisprudence lens, who can tell what one will find? If certain legal arrangements or procedures seem to lead to high stress, anger, feuding behavior, even violence between different persons, parties, neighbors, riparian land owners, and so forth, those arrangements and procedures may indeed become ripe for therapeutic jurisprudence inquiry.<sup>72</sup>

In the subsequent fifteen years since the publication of that paper, there has indeed been a very significant spread of therapeutic jurisprudence

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70. Ian Freckleton, *Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risk of Influence*, 30 T. JEFFERSON L. REV. 575, 576 (2008).

71. Wexler allows that therapeutic jurisprudence is not new in that it provides a therapeutic lens with which to examine existing and proposed laws, procedures, and roles. He claims that what does seem new about it is that it “brings together and situates under one conceptual umbrella areas that previously seemed disparate, many of which were developed in isolation . . . . Therapeutic jurisprudence itself, then, provides a lens and a new scope of scholarly inquiry.” Wexler, *supra* note 67, at 236.

72. *Id.* at 228.

principles and practices into both specialist and mainstream courts and legal practices. But Wexler goes further than this, noting that until that time the bulk of therapeutic jurisprudence scholarship had been micro-rather than macro-analytical. He sees it as a problem that so much therapeutic jurisprudence writing and research is “centrist”: it seeks to reform the law rule-by-rule and procedure-by-procedure rather than to take the transformative approach championed by the “outsider” movements in jurisprudence. Wexler considers this a potential weakness that much social science research and scholarship limits itself to micro-level recommendations and criticisms of the legal system. He notes that there has been no real attempt to construct a “Therapeutic State,” but argues that a macro-analytic therapeutic jurisprudence is needed and is emerging.<sup>73</sup>

If we conceive of both adversarialism and the purported therapeutic alternative as Kuhnian paradigms—which are paradigmatic of a contemporary “juristic model”—we may avoid some of the vagueness which has hampered previous analyses with an unclear picture of what theoretical perspectives and assumptions would need to change in order for therapeutic jurisprudence to obtain significant mainstream migration and credibility.<sup>74</sup> The dynamics and indicators of a paradigm in shift are clearly explained and illustrated by Kuhn and later contributors to the literature. The basic conceptual claim to explore, therefore, is that we currently have a juristic model that is paradigmatically adversarial and this model may be shifting to one that is paradigmatically therapeutic. Furthermore, according to the Kuhnian perspective, this claim is evidenced by the failure of adversarialism to solve persistent and recalcitrant juristic problems, which can in fact be solved by therapeutic practices. The recidivism of drug-addicted offenders is a problem for which adversarial courts have perennially failed to find an answer, for example, whereas drug courts—as therapeutic, nonadversarial fora—are to

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73. According to Wexler, micro-analytical therapeutic jurisprudence is not limited to work on an individual case, client, or problem. He asserts that it is more akin to a law reform process in which the practitioner or researcher attempts to affect all future similar issues or instances of the rule or procedure. In an earlier paper, Wexler had argued that therapeutic jurisprudence reflects changing conceptions of the law and legal scholarship and also made some comments about the relationship between therapeutic jurisprudence, the social sciences, and the discipline of law. David Wexler, *Therapeutic Jurisprudence and Changing Conceptions of Legal Scholarship*, 11 BEHAV. SCI. & L. 17 (1993). His view is that therapeutic jurisprudence raises questions which produce answers which are both empirical and normative, but the proper task of the legal scholar is not to generate data but to use data in framing recommendations and then to perhaps “suggest important and relevant lines of inquiry to social scientists.” *Id.* at 19.

74. This is not to suggest, of course, that a fully worked theoretical framework for the paradigm needs to be articulated in order to “sell” the paradigm, but that a generation of jurists who are immersed in the paradigm will need to develop and flesh out such a framework.

some extent solving this problem. The persistence of seemingly intractable problems for the adversarial system is countered by a concurrent rise in the effectiveness of therapeutic innovations to resolve some of these problems.<sup>75</sup>

Therapeutic jurisprudence is usually described as an interdisciplinary attempt to convince the legal profession that law is a social phenomenon which inevitably and significantly influences the health of many of those who come into contact with it.<sup>76</sup> Therapeutic jurisprudence indicates that we should strive to reform our legal institutions, rules, and roles to ensure that this influence creates as little harm as possible.<sup>77</sup> The concept of a juristic model that is proposed here is meant to be broad enough to capture at least the potential objects for reform that Wexler and Winick identify and those elements of the law and legal practice over which adversarialism has significant control.

#### *A. Juristic Models, Social Science and Ideology*

One of the reasons that it is difficult to establish which institutions, processes, and rules are caught within the ambit of “the adversarial system” is that there is such a strong and necessary streak of pragmatism in the law. Because of that inherent pragmatism, it is probably not surprising that law should be prominent among the disciplines that see themselves governed by such a predominantly scientific phenomenon as the conceptual paradigm.

At various stages, lawyers, political theorists, and legal academics have sought to equate law with the natural sciences. For example, John Stuart Mill asserted that there was such a thing as a “naturalistic” social science and that there were causal laws that shaped human society and social interactions just as causal laws define the physical world.<sup>78</sup> Some critics suggest that there is such a strong tendency for lawyers and legal philosophers to see the law as a given that it assumes the mantle of a

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75. See Freiberg, *supra* note 65, at 221 (discussing the divergent approaches of these courts).

76. See DAVID WEXLER & BRUCE WINICK, LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE 3 (1996).

77. *Id.* at 17.

78. See generally JOHN STUART MILL, A SYSTEM OF LOGIC (1930).

worldview itself rather than as reflective of some broader worldview. Campbell describes this tendency:

Legal thought seems possessed of characteristics and peculiarities in its mode of comprehending reality that distinguish it radically. . . . [E]ssentially, in my view, this stems from an acceptance of *law as given*, which results in most subsequent thinking resting on the massive assumption that the prescriptions contained in law and laws are in some sense descriptions of the actual world. Lawyers habitually operate within the framework of the legal system and adopt for their own standpoint the interpretations of reality contained in the law.<sup>79</sup>

The legitimacy of extending the paradigm concept to the social sciences and beyond can be observed in the long history of scholarship dedicated precisely to that objective.<sup>80</sup> Social scientists have always desired to define their disciplines as mature sciences in some sort of revolutionary, paradigm shifting phase or crisis, rather than as pre-scientific ideologies.<sup>81</sup>

One asserted problem with ideologies is that by rendering their proponents politically powerful but rationally and instrumentally impotent, they can create insurmountable barriers to reasoned and value-guided change within a discipline. Because ideologies claim to represent truth, their methods, models, and communities focus on the transmission and interpretation of unchallenged doctrine.<sup>82</sup> Kuhn held that science does not

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79. Colin Campbell, *Legal Thought and Juristic Values*, 1 BRIT. J.L. & SOC'Y 13, 13 (1974) (footnotes omitted). The tendency of some jurists to conceive of the law as being a form of objective logic has also been long criticized as a mask for more human characteristics. OLIVER WENDELL HOLMES, JR., *The Path of the Law*, 10 HARV. L. REV. 457, 465–66 (1897) (“The training of lawyers is a training in logic. The processes of analogy, discrimination, and deduction are those in which they are most at home. The language of judicial decision is mainly the language of logic . . . . But certainty generally is illusion . . . . Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding. You can give any conclusion a logical form. You always can imply a condition in a contract. But why do you imply it? It is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions.”).

80. Madan Handa, working in the field of the sociology of education, is usually credited with pioneering the development of the concept of the Kuhnian paradigm within the context of social sciences. He analogizes the scientific paradigm with what he calls a “social paradigm” and focuses on the social circumstances which precipitate a shift in social paradigms. The assertion here is that there is precedent for attempting to conceive of a Kuhnian paradigm as being relevant to disciplines outside of science. Madan Handa, Address at the International Symposium on Science, Technology and Development: Peace Paradigm: Transcending Liberal and Marxian Paradigms (Mar. 20, 1987).

81. Both Popper and the early Kuhn agreed they were pre-scientific ideologies.

82. KUHN, SCIENTIFIC REVOLUTIONS, *supra* note 1, at 77–79.



seek “true” theories looking for an ultimate picture of reality.<sup>83</sup> The tests of science need to be linked to workability and falsifiability. Therefore, scientific conjectures are always tentative in nature. As discussed in the previous section, the adversarial paradigm is closely, perhaps symbiotically, integrated with traditional liberal ideology and its strong focus on individual rights and due process. In much of the literature critical of therapeutic jurisprudence, the implication is that, in opposing the primacy of adversarialism, advocates for therapeutic jurisprudence are taking an anti-liberal stance against individual rights and due process.<sup>84</sup>

The nature of this criticism is vital. It may well be that the relative emphasis placed on the importance of due process, procedural fairness, or natural justice forms a deep enough schism between the two models of juristic thought to define them as paradigmatic competitors and illustrate their incommensurability. In the adversarial system, procedural integrity guarantees justice. This is largely achieved by allowing the adversarial litigants to define the dispute and the resources used to decide a winner. Within a therapeutic paradigm, the court and judge are required to be much more interventionist and to modify and customize procedure according to the opportunities that arise to address the real substance at the heart of disputes or of offending behaviors.

In an adversarial court, the scope for a judicial officer to address issues wider or more fundamental than those dictated by the black letter law, the strategic decisions of litigants and lawyers, and the rules of evidence and procedure are mostly quite limited. In a therapeutic court, judicial officers may well be required to seek out and act on such opportunities. The very fact that this would seem anathema to some liberal-minded critics suggests that they, as well as many therapeutic jurisprudence practitioners and advocates, see the differences as paradigmatic in the Kuhnian sense.

As for contemporary social scientists, the motivation for wanting to perceive the law, or a juristic model, as akin to natural phenomena is the desire for certainty among jurists. Certainty of definition, interpretation, and application are traditionally the cornerstones of good law making and judging.

To qualify as a paradigm in the Kuhnian sense, a candidate theoretical framework need not be linked to a purely empirical discipline.<sup>85</sup> This is

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83. *Id.* at 146–47.

84. *See, e.g.,* Hoffman, *supra* note 48, at 2071.

85. By empirical I mean either the sense in which a scientific discipline is based on data gleaned from observations, experience, or experiment, or the sense in which an empirical discipline or method

partly because the rigid and deterministic view of the natural sciences has been considerably eroded over the past century. For the purposes of this discussion, determinism is the position that every event—including human cognition, behavior, decision, and action—is causally determined by an unbroken chain of prior occurrences.<sup>86</sup> A deterministic worldview is one in which the physical world is fundamentally shaped and regulated by causal laws and relationships which can be observed and measured, leading to empirical certainty. This fundamental reliance on a deterministic worldview has largely been abandoned in the natural sciences, most notably in physics<sup>87</sup> and biology.<sup>88</sup> To some extent, it was Kuhn who identified and gave a broader theoretical justification for the trend away from a deterministic worldview in science by denying that observation, experience, and experiment serve as neutral arbiters between competing theories. In arguing that paradigms are largely expressions of a consensus among practitioners based on factors other than empirical certainty, the idea that there are theory-neutral scientific methods has largely been discredited. Law is also a fundamentally normative enterprise and any attempt to say what the law is or what it ought to be will be primarily a normative, not empirical, undertaking.

It is clearly important to address whether understanding law must necessarily collapse into making judgments about the value of the ways in which the law currently operates. If we were to grant, however, that we cannot make a full and adequate description of the law without taking a position as to its worth and value, that ought not to preclude us from asserting that the law can be conceived of as conforming to one paradigm or another. Indeed, we could interpret Kuhn as taking the view that these value judgments about opposing paradigms are what ultimately cause them to shift. This is contrary to the more analytical view, championed by Karl Popper, that it is empirical falsification, rather than the mindset of the practitioners in a discipline, that leads to significant theoretical shifts.<sup>89</sup>

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is differentiated from one which makes use of deduction from first principles, such as analytical philosophy.

86. PETER VAN INWAGEN, AN ESSAY ON FREE WILL 55–105 (1983). *See also id.* at 3 (defining determinism as “the thesis that there is at any instant exactly one physically possible future”).

87. *See generally* John Earman, *Aspects of Determinism in Modern Physics*, in PHILOSOPHY OF PHYSICS 1369 (Jeremy Butterfield & John Earman eds., 2007) (describing determinism’s uncertain status in physics as somewhere between robustness and fragility); George Ellis, *Physics and the Real World*, PHYSICS TODAY 58 (2005) (describing the inability of laws and theories of physics to predict most phenomena in the natural world).

88. Edwin Lewis & Ronald MacGregor, *On Indeterminism, Chaos, and Small Number Particle Systems in the Brain*, 5 J. INTEGRATIVE NEUROSCIENCE 223, 223–47 (2006).

89. This is not to say that legal theorists have decided one way or the other on this fundamental

We could just accept the view, in the vein of Dworkin, that law is a profoundly interpretive and social practice with some evaluative dimension required by the interpretive process such that any “theory about law” must be partly evaluative.<sup>90</sup> In fact, it is hard to find any contemporary legal theory which purports to be morally neutral. Such acceptance does not preclude juristic models from having the qualities of a conceptual paradigm and, presumably, some sociologists (in the sense attributed to Campbell earlier) would argue that this only strengthens the claim.

In rejecting the need for jurisprudence as a whole to conform to rigid determinism, Freedman suggests four reasons why laws of complete generality and uniformity are no longer the lynchpin of even the natural sciences.<sup>91</sup> First, the sciences no longer produce inductive inferences of absolutely rigid causal laws, but they produce statistical regularities assumed to predict what will happen in given situations—once that regularity begins to erode, the inferences become suspect. Second, the hard sciences now maintain a core belief in the existence of indeterminacy or chance at the heart of some physical events.<sup>92</sup> Third, some hypotheses cannot be verified, but this surely does not mean that which is hypothesized about cannot exist unless it is verified by direct observation or measurement.

This third component of Freedman’s argument is quite useful to the focus of this Article because it is compatible with the assertion by Popper, which Kuhn would not dispute, that theories or laws are always tentative, provisional, and liable to possible refutation.<sup>93</sup> So, despite the fact that the

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issue. For example, H.L.A. Hart claimed that observers and researchers can articulate laws and develop an understanding of law’s purposes, social functions, and the ways in which it gives reasons for action without taking a view as to the moral status of those reasons or purposes. For instance, we could tell the complete story of the Nuremberg laws, which prohibited German nationals from marrying Jews, without either condemning or advocating any moral rationale for those views in so doing. H.L.A. HART, *THE CONCEPT OF LAW* (Peter Cane et al. eds., Oxford University Press 2d. ed. 1994) (1961).

90. See generally RONALD DWORKIN, *LAWS EMPIRE* (1986).

91. M.L.A. Freeman, *Acquiring Social Knowledge*, in LLOYD’S JURISPRUDENCE 5, 6–7 (2001).

92. Typically illustrated by reference to the Heisenberg Uncertainty Principle in quantum mechanics, which holds that states that pairs of physical properties, such as position and momentum, cannot both be known simultaneously. The more precisely one property is known, the less precisely the other can be known. This statement has been interpreted in two different ways and this is not just a function of the measuring process or equipment, Ballentine asserted that this is a statement about the nature of the system itself as described by the equations of quantum mechanics. Leslie Ballentine, *The Statistical Interpretation of Quantum Mechanics*, 42 REV. MOD. PHYS. 358, 358–81 (1970).

93. Popper’s views on the falsifiability requirement are most significantly discussed in *The Logic of Scientific Discovery*. KARL POPPER, *THE LOGIC OF SCIENTIFIC DISCOVERY* (1980). I do not suggest here that Kuhn subscribes to the role of falsification (which he certainly does not) but just with the

adversarial paradigm may be heavily entrenched due to its tested role in informing our juristic model for centuries, its component theories and methods (if we accept the analogy) are nevertheless tentative and open to falsification.

Finally, Freedman recognizes Kuhn's emphasis on the subjective and values-based influence of "normal science," implying that a key reason for the continuation of a current paradigm is the state of mind of its proponents and advocates. They share an entrenched commitment common theoretical beliefs, values, instruments, and methods.

Freedman tracks a detailed debate in the jurisprudence and social science literature about whether law, or even the wider field of the social sciences, can be contained within the empiricist account of the natural sciences. If it can, then the four assertions above suggest there is no reason why any paradigm of law cannot be conceived of as tentative and subject to fundamental change. But regardless of whether there is a close enough relationship to make that conceptual leap:

[J]urisprudence . . . is concerned with rule-governed action, with the activities of officials such as judges and with the relationship between them and the population of a given society. . . . But whether jurisprudence is a social science or not, the debates about methodology in the social sciences between positivists or empiricists and practitioners of hermeneutics are echoed in juristic literature."<sup>94</sup>

It seems to be a tenable position that even if we were unable to classify law as a social science, the key methodologies and features of a juristic model are analogous enough to those of a social science. Hence, to a natural science, that it is a valid and insightful exercise to analyze alternative juristic models as if they were Kuhnian paradigms and capable of shifting in the Kuhnian sense. This seems to be the unspoken, and perhaps intuitive, assumption made by those scholars who have asked whether we are currently experiencing a paradigm shift from an adversarial to a therapeutic juristic model.<sup>95</sup> Without a rigorous analysis of

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position that theories are always liable to change. A very useful comparison and contrast of Kuhn and Popper in relation to why scientists "believe" (or claim to know) can be found in FULLER, *supra* note 26, at 111.

94. Freeman, *supra* note 91, at 10.

95. Freiberg and others actually claim that in a sense the paradigm shift is well advanced. He observes that:

[N]ot only does the criminal justice system overall not function adversarially for the vast majority of cases, but that changes in a number of areas have affected the adversarial

the nature and content of the competing paradigms, the assumption is premature and, to some extent, naive.

Kuhn held that unlike a normal scientist, a student in the humanities disciplines, such as history, “has constantly before him a number of competing and incommensurable solutions to these problems, solutions that he must ultimately evaluate for himself.”<sup>96</sup> Once a paradigm shift is complete, a scientist cannot then explain a new phenomenon in terms of the findings, rules, or accepted facts that were unique to a previous paradigm. For example, it would not be open to contemporary pathologists to claim that disease was caused by miasma.<sup>97</sup> But Kuhn argued that a person working in the social sciences or humanities can often select from a range of theoretical perspectives by which she can interpret or critique the findings of others within their discipline. This is somewhat true of the law and jurisprudence, which have seen a wide range of critical and theoretical perspectives develop.

Fuller considers this to be a fundamental obstacle to the application of the paradigm concept to the social sciences and humanities. He interprets Kuhn’s position in *The Structure of Scientific Revolutions* in the following manner:

Kuhn identified his Eureka moment—when his theory of paradigms finally gelled—as occurring when he witnessed the vast difference in the way social and physical scientists conduct arguments. No matter how much physicists disagree on the value of a particular piece of research, they could always agree on an exemplar against which to judge it. This was not possible in the social sciences, where any candidate exemplar (say, Marx, Durkheim, Keynes, Freud, Skinner, or nowadays Foucault would also be a lightning rod for fundamental disagreements).<sup>98</sup>

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paradigm in ways that require a fundamental re-examination of the operation of the courts, of the role of judicial officers and lawyers and, significantly, of the way in which lawyers of the future are educated.

Freiberg, *supra* note 65, at 205.

96. KUHN, *SCIENTIFIC REVOLUTIONS*, *supra* note 1, at 164.

97. The miasmatic theory of disease held that diseases such as cholera, Chlamydia, or the Black Death were caused by a miasma, a noxious form of “bad air.” Ana Diez-Roux, *On Genes, Individuals, Society and Epidemiology*, 148 AM. J. EPIDEMIOLOGY 1027, 1027 (1998). Miasma was considered to be a poisonous vapor or mist filled with particles from decomposed matter (miasmata) that caused illnesses. *Id.* It was identifiable by its foul smell. This concept was displaced by the germ theory of disease, probably as late as 1890.

98. FULLER, *supra* note 26, at 21–22.

But as we have already discussed, there is no need to read Kuhn as asserting that a paradigm may only be a phenomenon applicable to purely empirical discipline. To conceive of all the humanities and the social sciences as beholden to a wide range of possible exemplars, depending on the views of the individual practitioner, is not to deny that any one of them currently operates pursuant to a particular paradigm or disciplinary matrix. More particularly, to hold that “law” currently does operate by reference to an adversarial paradigm would seem to defuse Fuller’s simplistic analysis.

### *B. Juristic Models as Paradigms*

There have been convincing attempts to provide a theoretical justification for extending the notion of a Kuhnian paradigm to include juristic thought and, therefore, legal institutions and methods.<sup>99</sup> Early attempts to do this included an explanation of the restorative justice approach to juvenile justice processes<sup>100</sup> and explanation for the resilience of concepts of marital property law.<sup>101</sup>

Campbell has suggested that it is possible to establish the “inherent propriety of applying Kuhn’s thesis to juristic thought”<sup>102</sup> by arguing at two levels: “Firstly, juristic thought as a realm of knowledge is open to similar considerations as scientific thought; secondly, agreement can be reached on the question whether juristic thought is at the paradigmatic stage or the pre-paradigmatic stage.”<sup>103</sup>

Interestingly, sociologists, such as Campbell, are perhaps both the most ardent of the academics in adopting the phenomenon of the Kuhnian paradigm shift to their own discipline and in arguing that legal thought—both in the sense of the judicial and legal reasoning process and in the

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99. Of course, there has always been debate about whether law and jurisprudence falls within the rubric of the humanities or social sciences at all. This is because the practice of law is largely governed by rules which derive their normative force from the authority and sovereignty of their source rather than from the doctrinal or theoretical perspectives. There may be an element of intellectual isolationism and elitism in Fuller’s assessment, as well. He claims that, despite the early Kuhn’s dismissal of the social sciences as being explainable by the concept of the paradigm, “[n]evertheless, Kuhn’s admirers persisted in wrenching *Structure* from its original context and treating it as an all-purpose manual for converting one’s lowly discipline into a full-fledged science.” FULLER, *supra* note 26, at 22.

100. See generally EDWIN LEMERT, *THE JUVENILE COURT SYSTEM: SOCIAL ACTION AND LEGAL CHANGE* (1970).

101. See generally Michael Freeman, *Towards a Rational Reconstruction of Family Property Law*, in 25 *CURRENT LEGAL PROBLEMS* 84 (Lord Lloyd of Hampstead & Georg Schwarzenberger eds., 1972).

102. *Id.* at 15.

103. *Id.*

jurisprudential realm—constitutes a Kuhnian paradigm. Some emphasis ought to be placed on this given that sociology is the discipline most concerned with analyzing and classifying other academic fields and their relevant worldviews. Within the field of the sociology of knowledge, a number of influential figures have defended the view that juristic thought represents a paradigm.<sup>104</sup> Well before the advent of some of the most influential schools of jurisprudence and before the exposure of the myth of the declaratory theory of judging, Aubert reached the view that there was significant similarity in methods of legal reasoning, modes of legal decision making, the construction of legal propositions, shared assumptions, and standard methodologies.<sup>105</sup> Aubert also noted that these methods and assumptions were reflected in many schools of jurisprudence. He argued that these are all indications of the clear existence of a classic disciplinary paradigm.<sup>106</sup> Campbell concedes<sup>107</sup> that there are sufficient commonalities, from a sociological perspective, between legal thought and scientific thought and between juristic activity and scientific activity—to accept that law and legal theory operate pursuant to a paradigm, even if only for purposes of heuristics or exegesis.<sup>108</sup> With the benefit of another decade of jurisprudence to survey after Aubert, Campbell also acknowledged that any number of emerging legal theories could represent a new paradigm suggesting changed values, standards, and criteria for selecting problem areas for research and for “accepting the legitimacy of solutions.”<sup>109</sup>

A scientific hypothesis, of course, can be disproved by one contrary and reproducible observation. But it is not particularly useful to class propositions, assertions, and explanations in law as hypotheses. For example, we could assert that drug courts are more effective than

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104. Vilhelm Aubert, *Researches in the Sociology of Law*, in *LAW AND THE SOCIAL SYSTEM* 48, 50–53 (Michael Barkun ed., 1973) (1963).

105. *Id.* at 57–59.

106. Vilhelm Aubert, *The Structure of Legal Thinking*, in *LEGAL ESSAYS: A TRIBUTE TO FREDE CASTBERG* 41 (Johannes Andenaes et al. eds., 1963); see also Campbell, *supra* note 79, at 15 (“[L]egal methods, legal conceptualizations and the underlying theory share an identity or internal coherence which has, indeed, remained constant over time.”) (footnotes omitted) (quoting Aubert’s conclusion in Aubert, *supra* note 104).

107. *Id.* at 13.

108. In terms of heuristics, Campbell means that even if we study law for the purposes of uncovering the set of simple and efficient rules which have evolved in the common law jurisdictions to try and reduce complex social and legal problems to contests between relatively simple propositions, rights and values, a paradigm readily emerges. In terms of exegesis, if we study law to uncover and explain the historical and cultural backgrounds and contexts of the authors of law, their texts and intended audiences, a paradigm also readily appears.

109. *Id.* at 16.

mainstream courts in reducing recidivism rates among drug addicted offenders. An observation of one court or jurisdiction where that has not been the case for a particular period may be significant in terms of its contribution to the overall evaluation of the court, but a single observation ought not to drive law or policy. A theory is more resilient than that; a theory can be modified. A paradigm, furthermore, will not be as easily shifted by anomalies as a hypothesis or a theory. In that sense, a paradigm has more work to do than these other, narrower tools.

Regardless of how widely or narrowly we conceive “the law” to be, Campbell concludes that jurisprudence itself is informed by a paradigm at any given time:

[L]egal theory and jurisprudence [do] operate under a particular paradigm. This paradigm, derived from the commitments and reasoning of practical lawyers, involves a particular “world view,” an orientation to practical and pragmatic problem-solving, and set methods for tackling these problems. . . . With its focus on the pragmatic concerns of decision-making and the perspective of the judge in recognising as “legal” certain factual situations and in deciding what particular legal meaning to attach to them, legal theory adopts a social control standpoint. Its “exemplars” and puzzle solutions flow from the judicial process as does its methodology in seeking to answer such questions. Commitments and stances of this sort go to make up the paradigm—the constellation of beliefs, values, [and] techniques that is shared by members of the jurisprudential community.<sup>110</sup>

If we were to grant that they are competing paradigms, then both adversarialism and therapeutic jurisprudence probably share the general quality of social control. But they differ in relation to the objectives of that control, in what it means to say that a certain fact situation has a “legal” status, and in that the puzzle solutions within a therapeutic jurisprudence paradigm would subsume, redefine to some extent, and add to those which exist under the adversarial paradigm.

#### IV. IS ADVERSARIALISM A PARADIGM?

If juristic models are valid candidates for Kuhnian paradigms, then there would appear to be little doubt that “the adversarial system” is a

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110. *Id.* at 22 (footnote omitted).



paradigm. It may be the only paradigm that has ever defined the modern common law legal world, despite considerable changes in the wider disciplinary matrix within which it resides. Academic and judicial writings debating whether adversarialism is the best and most efficient method of dispensing justice are legion. This does not beg the question as to whether adversarialism is the current paradigm—it assumes that it is so. Although there are variations<sup>111</sup> from jurisdiction-to-jurisdiction and from time-to-time, the assumption is that there exists a core principle, method, and belief that defines the model. In the face of the evolution and reform of the legal system, there nevertheless remains a minimal skeleton of adversarial principles which may not be breached.

There has been some academic and judicial acknowledgement that the principles claimed to comprise the core of the adversarial process are a matter of historical and cultural protocol, rather than the product of some rational, *a priori*, mandated design.<sup>112</sup> To a large extent, it appears that the principles of adversarialism are a product of common law convenience and are susceptible to paradigmatic change if the judiciary is in favor of change. An early assertion that the adversarial core is a product of the court system itself comes from Blackstone:

[I]f therefore the fact be perverted or misrepresented, the law which arises from thence will unavoidably be unjust or partial. And, in order to prevent this, it is necessary to set right the fact and establish the truth contended for, by appealing to some mode of *prohibition* or *trial*, which the law of the country has ordained for a criterion of truth and falsehood.<sup>113</sup>

According to Underwood, this is an express acknowledgement that the civil trial has “been ordained by the common law” itself as the method of resolving civil disputes in a court.<sup>114</sup> Underwood goes on to argue, based on observations similar to those of Davies,<sup>115</sup> that the imperatives which

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111. See generally Oscar Chase, *American Exceptionalism and Comparative Procedure*, 50 AMER. J. COMP. 277 (2002) (discussing the great variety of adversarial and inquisitorial approaches in legal procedure).

112. G.L. Davies, *The Reality of Civil Justice Reform: Why We Must Abandon the Essential Elements of Our System*, 12 J. JUD. ADMIN. 155, 157 (2003).

113. WILLIAM BLACKSTONE, *THE COMMENTARIES ON THE LAWS OF ENGLAND: BOOK III* 329 (Gryphon Editions 1983) (1768).

114. Peter Underwood, *The Trial Process: Does One Size Fit All?*, 15 J. JUD. ADMIN. 165, 166 (2006).

115. Davies, *supra* note 112, at 157. See also G.L. Davies, *Civil Justice Reform: Some Common Problems, Some Possible Solutions*, 16 J. JUD. ADMIN. 5, 5 (2006) (examining the origins of and

historically drove the structure of civil procedure—such as the need for oral proceedings, a single climactic trial, and litigation controlled by the parties—no longer apply in many cases and that the adversarial core ought to be malleable.

The fundamental statement of the nature of judicial power by the High Court of Australia is that it is a power of a sovereign authority to “decide controversies between its subjects, or between itself and its subjects, where the rights relate to life, liberty or property.”<sup>116</sup> We can perhaps glimpse the inalienable adversarial core in that statement: that a court exists to decide a controversy. Article III, Section 2 of the United States Constitution outlines the jurisdiction of the federal courts of the United States with a similarly broad focus on the settling of “controversies.”<sup>117</sup>

The adversarial paradigm is partly an assumption that those who access the courts do so because they are adversaries, and that they will remain adversaries for at least so long as their matter continues to be before the court. But, in fact, the paradigm expects and requires them to be adversaries. The court fundamentally exists to resolve the dispute by declaring a winner or coercing the litigants into a settlement, not to change those elements of the relationship between the parties that led to the dispute.<sup>118</sup> The pragmatic, but naïve, assumption is that community stresses and tensions are reduced primarily by adjudicating the particular dispute, not by working on or repairing dysfunctional relationships or lives. As discussed above, adversarial trials also serve a symbolic and cultural purpose, providing a certain measure of catharsis by the nature of the ritual itself. In comparison to inquisitorial systems, for example, the adversarial trial, its advocates claim, depends essentially on the emphasis on the participation and control of the litigant parties themselves is essential.<sup>119</sup>

rationales for some key procedural mechanisms of civil trials and arguing that many rationales, including that for the reliance on oral testimony, are no longer valid).

116. *Huddart Parker & Co. Pty Ltd v. Moorehead* (1909) 8 CLR 330, 357 (Austl.).

117. U.S. CONST. art. III, § 2, cl. 1 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”).

118. The existence of some restorative, therapeutic, and less adversarial processes and courts—which are seen as “specialist”—underscores the assertion that these deviate from the conceptual and legal norm.

119. Ellen Sward, *Values, Ideology and the Evolution of the Adversary System*, 64 IND. L.J. 301,

Although there are, of course, some courts and tribunals which operate in a far less adversarial manner than the trial courts, these fora are defined by their deviations from the adversarial norm. We ought also not to define adversarialism too narrowly. Requiring or expecting parties to adopt an adversarial approach—and for a judge not to intervene beyond what is necessary to maintain procedural integrity—does not mean that the proceedings need to be overtly conflictual. In many instances, what is adversarial about a legal process is that it is up to those seeking and resisting remedies to make their cases independently of the adjudicator. But there is also little doubt that powerful and influential sections of the legal profession and the judiciary view some elements of the adversarial process as so intrinsic to their roles as officers of the court that they cannot be dispensed with. Then, this commitment to the perceived integrity of the system also becomes a source of their power. For example, McEwan claims that the formation of a professional bar in eighteenth century England led to an emotional commitment by the English Bar to traditional adversarial features such as: “[C]ross-examination, non-disclosure of the defense case and the labyrinthine complexities of the rules on the admissibility of the defendant’s criminal record might thus be seen as reluctance in the legal profession to let go of its power.”<sup>120</sup>

The language of its critics also bestows upon adversarialism the status of paradigm. In Menkel-Meadow’s wide-ranging critique of the inability of adversarialism to retain its relevance in a postmodern world, she points to wider academic dissatisfaction with its value. She claims that “[d]espite the longevity and robustness of adversarialism as a mode of human discourse, even some philosophers and epistemologists have questioned its value as the best way to understand the world.”<sup>121</sup> The choice of the descriptor “mode of human discourse” is an interesting one and appears to be equivalent to what was posited above as a juristic model in relation to the law. Menkel-Meadow points out that there are many other modes of

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302 (1989) (“[C]urrent ideology extols the adversary system primarily as the best system for protecting individual dignity and autonomy . . . .”). Markus Dirk Dubber provides for a further elaboration of the value of autonomy in the adversarial approach. Markus Dirk Dubber, *The Criminal Trial and the Legitimation of Punishment*, in *THE TRIAL ON TRIAL VOLUME I: TRUTH AND DUE PROCESS* 85 (Antony Duff et al. eds., 2004).

120. Jenny McEwan, *Ritual, Fairness and Truth: The Adversarial and Inquisitorial Models of Criminal Trial*, in *THE TRIAL ON TRIAL VOLUME I: TRUTH AND DUE PROCESS* 62 (Antony Duff et al. eds., 2004).

121. Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5, 14 (1996) (footnotes omitted).

human discourse, some of which relate to the law and some of which do not. Menkel-Meadow position is that:

[T]he scientific method, for example, which, although it needs to “falsify” propositions with contrary data, does not set out to prove something by juxtaposing its opposite. Additionally, conversation, storytelling, mediation, and consciousness-raising are all more circular and less structured in method. Dangerous monologic (or false adversarial) forms like inquisitions and Star Chambers also exist. Finally, there are other, completely different legal systems—civil, mediational, and bureaucratic systems are examples.<sup>122</sup>

It is worth noting that tribunals within the common law systems which seek to vary or dispense with some core adversarial protections and guarantees tend to be created by statutes which include significant limitations on how information obtained at the expense of those protections can be used. This is evidence that the more a process is seen to deviate from the adversarial paradigm, the more oversight and accountability is required to limit the potential “damage” suffered as a result.<sup>123</sup>

Justice David Ipp acknowledges that the adversarial system of litigation has grown and evolved organically. The system is “adversarial in character, but it has long progressed from the basic classical adversarial system where judges are entirely passive. By an ad hoc development of rules we now have a hybrid system based on adversarial elements. It should be recognised that our system has never been immutable.”<sup>124</sup>

#### V. IS THERAPEUTIC JURISPRUDENCE A PARADIGM?

If we accept the assertions of Campbell, Aubert, Cotterre, and others that juristic thought and legal discourse or practice can constitute distinct paradigms in the Kuhnian tradition, then it is reasonable to ask whether

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122. *Id.* at 14 n.38.

123. For instance, in Queensland, the *Crime and Misconduct Act 2001* (Qld) s 190 (Austl.), makes it an offense for a person to refuse to answer a question put to them by the presiding officer at a Commission hearing. The provision expressly displaces the right to silence and to legal professional privilege. Section 197(2) of the Act then provides that “[t]he answer, document, thing or statement given or produced is not admissible in evidence against the individual in any civil, criminal or administrative proceeding.” *Crime and Misconduct Act 2001* (Qld) s 197(2) (Austl.).

124. MICHAEL SANDFORD KING ET AL., NON-ADVERSARIAL JUSTICE 11 (2009) (quoting David Ipp, *Opportunities and Limitations for Change in the Australian Adversary System*, in BEYOND THE ADVERSARIAL SYSTEM 68, 69 (Helen Stacy & Michael Lavarch eds., 1999) (writing extra-curially while Justice David Ipp was a judge of the Supreme Court of Western Australia).

therapeutic jurisprudence constitutes such a paradigm.<sup>125</sup> Although I do not assert here that therapeutic jurisprudence—at least at this stage of its evolution—is, in fact, a paradigm, it is useful to moot it as such for the purposes of contrasting the adversarial paradigm with the somewhat embryonic, nebulous, and vague delineation we currently have of the “post-adversarial” paradigm which is prevalent in the literature. With that in mind, first consider that a juristic model is something of an abstraction itself and does not need to exhaustively explain and reconcile all the elements of the legal system. However, the model ought to be able to inform each of those processes to the extent that it can provide exemplars for the solution of problems, rather than puzzles. Both the extensive body of therapeutic jurisprudence literature and the application of therapeutic jurisprudence principles in so many legal and judicial practices demonstrate that there is significant potential for the movement to provide exemplars for many of those processes.<sup>126</sup> But given that a change of paradigm does not change everything within a disciplinary matrix, this ought not to be critical.<sup>127</sup>

One difficulty with affording therapeutic jurisprudence paradigm status is the risk of being seen to hold it out as an exclusive and self-contained replacement for the core principles which define the adversarial paradigm. There has been an apparent, developing reluctance among advocates of the various nonadversarial vectors in legal practice and theory to identify and name a new legal paradigm. There is even a relatively recent reluctance among some advocates to use the term “paradigm,” probably out of a misplaced fear that to propose a paradigm shift would suggest that adversarial processes have no place in modern law. This, as we have seen above, is to misunderstand the nature of a paradigm.

A more evolved disciplinary matrix retains the core principles of the replaced paradigm, but these principles are not necessarily part of the defining core of the new paradigm; they may be questioned or breached without fear of thereby acting illegitimately or unlawfully. They lose some of their normative power and all of their exclusive power to explain. We can sense this reluctance and tension in the tendency now to replace the term “nonadversarial” with “postadversarial”<sup>128</sup> and even to replace

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125. It is also reasonable to ask whether therapeutic jurisprudence is capable of constituting a paradigm.

126. It is beyond the scope of this Article to enumerate how each of the posited processes for a juristic model relates to various therapeutic jurisprudence initiatives or principles.

127. This is, of course, true of other potential paradigms, such as that potentially delineated by feminist jurisprudence or Critical Legal Studies.

128. Arie Freiberg, *Post-Adversarial and Post-Inquisitorial Justice: Transcending Traditional*

“therapeutic” or “problem solving” with “solutions focused.” The latter terms seem to implicitly allow for the partial retention of adversarial principles and practices as an acknowledgement of their continuing legitimacy, while acknowledging the danger of being defined as radical, fringe, or transient.<sup>129</sup> There are those, such as Mark Satin,<sup>130</sup> who see this reluctance as unnecessary and counterintuitive. They argue that the reluctance of advocates of the various nonadversarial vectors to explore the paradigm-shifting potential of their vectors may result in their movements missing the opportunity to significantly reform or to transform the legal system. This fear, which resonates in the concerns of Freiberg, Rottman, and others, is that therapeutic jurisprudence can only survive as a defining core of judicial practice if it is mainstreamed. But even if we are to see a paradigm shift in juristic models, the resulting paradigm is almost certainly not going to be nonadversarial in the sense that adversarial principles and practices have no use. To that extent, the use of the descriptor “postadversarial” seems prudent.

There are at least three justifications for conceiving of therapeutic legal thought and practice as potentially conforming to Kuhn’s model of a paradigm.

First, there is the matter of disciplinary acceptance. A number of key researchers, and critics, in the literature do talk about therapeutic jurisprudence as a new paradigm—either in and of itself or as a component of some wider category such as Comprehensive Law.<sup>131</sup> A significant

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*Penological Paradigms*, 8 EUR. J. CRIM. 82, 98 (2011) (“[T]he theories of therapeutic jurisprudence and restorative justice have ameliorated some of the more adverse features of fully fledged adversarialism and sought more positive, transformational outcomes for offenders, outcomes that have required the more active participation of both offenders and the courts . . . . The broader idea of ‘non-adversarial justice’ is still in its infancy and encounters considerable skepticism. ‘Non-’ or ‘post-inquisitorialism’ is likely to suffer the same fate. Both legal systems have strong and long cultural traditions that permeate legal education and all branches of the profession. Policy makers are more comfortable with known political paradigms and are nervous of system change. Punitive criminal justice is culturally and institutionally entrenched.”) (internal citations omitted).

129. Perhaps the experience of other potentially paradigm shifting “movements” such as critical legal studies encourages this caution.

130. Mark Satin, *Healing First: Time for the US Justice System to Get Less Mechanistic and More Compassionate*, 119 RADICAL MIDDLE NEWSLETTER, Oct./Nov. 2008, [http://www.radicalmiddle.com/x\\_wexler.htm](http://www.radicalmiddle.com/x_wexler.htm).

131. INWAGEN, *supra* note 86; Earman, *supra* note 87; Ellis, *supra* note 87; Michael King, *Therapeutic Jurisprudence in Australia: New Directions in Courts, Legal practice, Research and Legal Education*, 15 J. JUD. ADMIN. 129, 140–41 (2006). Bryant and Faulks examine the extent to which the Family Court of Australia, operating pursuant to a policy of less adversarial proceedings, operates in a therapeutic paradigm and conclude that those functions of the court are “consistent with a therapeutic paradigm.” Bryant & Faulks, *supra* note 28, at 108. In accusing Therapeutic Jurisprudence of breaching the American equivalent of the Doctrine of the Separation of Powers, Hoffman characterizes Therapeutic Jurisprudence as a paradigm which threatens the importance of judicial

number of law schools include both undergraduate and postgraduate studies in therapeutic jurisprudence, Comprehensive Law, and non-adversarial justice in their curricula. Judicial training in these lenses and vectors is relatively common. It is even becoming more common to read express reference to therapeutic jurisprudence in the published judgments of Australian, American, New Zealand, and Canadian courts and tribunals.<sup>132</sup>

Second, consider that juristic thought obviously does seem to have some of the same qualities as scientific and social scientific thought. Jurists, legal academics, criminologists, trial lawyers and others make use of the scientific method as one means of testing the truth of assumptions and hypotheses and of a wide range of methods borrowed from the social sciences. Third, and perhaps most importantly, from a Kuhnian perspective, we can validly ask whether juristic thought in general is at a pre-paradigmatic or paradigmatic stage.<sup>133</sup>

Despite the fact that some researchers expressly refer to therapeutic jurisprudence as a paradigm—and do so to propose it as a clear alternative to an adversarial paradigm—advocates, analysts, and critics of therapeutic jurisprudence accord it differing status. Some see it as a unique and identifiable “movement,” some see it as a lens or vector within a wider movement, and others seem to afford it a much narrower ambit. We have seen Freiberg and others describe it as an alternative paradigm to adversarialism, and we have seen Wexler the need for therapeutic jurisprudence practitioners to undertake more macro analytical research. Some voices of caution, such as Freckleton, have called for restraint in emphasizing the ambit of therapeutic jurisprudence and in treating as it a panacea.<sup>134</sup>

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independence. Morris Hoffman, *Therapeutic Jurisprudence, Neo-Rehabilitationism and Judicial Collectivism: The Least Dangerous Branch Becomes the Most Dangerous*, 29 FORDHAM URB. L.J. 2063, 2088 (2002).

132. See, e.g., *Fairhall v Sec’y, Dep’t of Families, Cmty. Services & Indigenous Affairs* [2007] 1323 AATA (Austl.). See also *Marion Collier v Repatriation Comm’n* [2007] 1134 AATA (Austl.); *Lee v State Parole Auth. of N.S.W* [2006] NSWLR 1225 (Austl.); *B v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] 173 FLR 360 (Austl.); *DPP v. Stone* [2003] VSCA 208 (Austl.).

133. Campbell, *supra* note 79, at 18; Aubert, *supra* note 104, at 50.

134. There are no explicit arguments which would deny therapeutic jurisprudence paradigm status in the literature. Most critics are more concerned with pragmatic and legal or constitutional issues rather than ontological or epistemic status. However, there is some debate, among therapeutic jurisprudence advocates about whether it constitutes a “theory.” Wexler and King are both reticent to accord it theory status, perhaps for fear of alienating the profession and the academy by characterising it as too ambitious or radical a project. Others, such as Daicoff, Menkel-Meadow, and Horahave no doubt that it constitutes a coherent theory which promises much more than a simple vehicle for the use

Daicoff has asked whether the various vectors of the Comprehensive Law Movement ought to be fully integrated with the legal system or whether they ought to be distinct and specialized areas of practice within law. Her view is that there ought to be a hybrid response, in that all lawyers should be schooled in these vectors (including in therapeutic jurisprudence) but that they should then be able to choose whether to work in the “mainstream” or in a “specialized area” that emphasizes a vector. She concludes that this hybrid approach is the most likely given the current level of penetration of these vectors within both law schools and within the legal profession. According to Daicoff, “while the integration/specialization question remains open, the hybrid approach appears to be most likely, where most lawyers and judges are aware of the various comprehensive law vectors, but only a few choose to practice or adjudicate in those ways.”<sup>135</sup> However, Daicoff stress that “most importantly, therapeutic jurisprudence and the other comprehensive law vectors should be recast as simply ‘best lawyering practices,’ excellent leading advising, or ‘leadership.’”<sup>136</sup>

Taking a somewhat more cautious approach to the question of integration, Freckleton suggests that:

[I]n the maturation phase of therapeutic jurisprudence those who identify its advantages have an intellectual responsibility to be clear about the parameters and limits of therapeutic jurisprudence. This will reduce its invocation in ways that will bring it into disrepute and result in outcomes inconsistent with its values. In addition, with its successes comes an obligation to explore what is claimed to be its implementation in practice and to evaluate rigorously whether such implementation is achieving the desired objectives.<sup>137</sup>

Although necessary, the mere presence of the therapeutic jurisprudence paradigm within the mainstream practice of lawyering and judging is not sufficient for a therapeutic jurisprudence transformation of law. Such a transformation would require the articulation of arguments and positions challenging the core of legal theory and praxis—positions inconsistent with the dominant paradigm. According to Kuhn, inconsistency between

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of social science data to reform particular laws and procedures. Birgden goes farther and would prefer to conceive of it as a “philosophy.” Some critics have berated Wexler, as one of the founders of therapeutic jurisprudence, for the apparent reluctance to push therapeutic jurisprudence as a “reinvention of the law.” Satin, *supra* note 130.

135. Daicoff, *supra* note 67, at 566.

136. *Id.* at 572.

137. Freckleton, *supra* note 70, at 576.



dominant and emerging scientific paradigms is one of the *sine qua non*<sup>138</sup> conditions for the accomplishment of scientific revolutions. We need to ask whether therapeutic jurisprudence is, in fact, being advanced in this way. Is it capturing the legal and scholarly imagination as a potential juristic game-changer?

There is no guarantee that an innovative theory or practice will achieve paradigm status. This lack of certainty exists because the fundamental requirement for that status is the development of a dominant practitioner mindset and disciplinary matrix, rather than a set of empirical data or a certain level of falsification. Furthermore, to the extent that therapeutic jurisprudence challenges the dominant legal paradigm, it is likely to be resisted by the mainstream.<sup>139</sup> The depth of that resistance will afford some insight as to its status as a potentially transformative paradigm. There is evidence that the main critics of therapeutic jurisprudence do, indeed, see it as a force that undermines or challenges some of the most fundamental tenets of the common law legal systems.

To what extent, then, is therapeutic jurisprudence articulating in-depth, potentially revolutionizing critiques of law and the legal thought rather than simply informing discrete, incremental changes small enough not to threaten the ruling adversarial paradigm? Problem solving courts are tolerated and generally seen as “special” rather than revolutionary. But the status of those practitioners operating according to a new paradigm is also important. Even idiosyncrasies of background and personality can play influential roles. The status of those proposing the new paradigm can be critical to the rate of conversion.<sup>140</sup>

The claim most commonly made by advocates of a new paradigm is that it can resolve the problems that have been intractable under the existing paradigm. That tends to be a strongly influential, but not always sufficient, claim. Still, this ability to resolve intractable problems is

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138. An essential and indispensable condition precedent.

139. See Aubert, *supra* note 104, at 50–53.

140. A notorious example of this is that of Lord Rayleigh, John William Strutt, who won a Nobel Prize for discovering the inert gas argon. This factual information needs a citation. His name was accidentally left off a paper submitted to the British Association for the Advancement of Science in 1924. Robert Merton, *The Matthew Effect in Science*, 159 SCIENCE 56, 62 (1968). The editors and reviewers rejected the paper, labeling it as “the work of one of those curious persons called paradoxers.” *Id.* (quoting R.J. Strutt, *John William Strutt, Third Baron Raleigh* (1924)). Once Rayleigh’s name was added, the paper was immediately published. *Id.* Merton, writing of the sociological equivalent, calls this phenomenon “the Matthew Effect,” by which the higher the academic or professional status of a person attempting to make an important or unorthodox contribution, the less likely it will be listened to. See generally *id.* at 56–63; *Matthew* 25:29 (“For to all those who have, more will be given, and they will have an abundance; but from those who have nothing, even what they have will be taken away.”).

perhaps one of the strongest indicators that therapeutic jurisprudence promises to be paradigmatic rather than incremental. There are weaknesses and failings of both the civil and criminal law that are perennial, notorious, and apparently intractable. Recidivism among criminal offenders and the failure of policies and practices of rehabilitation have been particularly vexing issues in criminal justice. We must acknowledge, however, the successes of a number of problem solving courts in addressing recidivism by promoting and managing change in offenders. These successes have received significant attention and led to a considerable expansion both in the type and number of problem solving courts and in calls for their techniques to be mainstreamed.<sup>141</sup>

Pursuant to the adversarial paradigm, courts have little freedom to approach the style of judicial management seen in venues such as the drug courts. Compliance with mainstream sentencing law can readily be characterized as “puzzle solving.”<sup>142</sup> A mainstream sentencing court is primarily concerned with imposing penalties according to legislative sentencing factors. It is not too difficult to conceive of this change in approach to drug-addicted offenders as reflective of a change in broader worldviews. There has been a clear jurisprudential, legislative, and political trend to view some classes of offense as social and public health issues rather than as simply legal problems. It is often argued that the drug courts themselves are as much a development in public health policy as an evolution in court functions.<sup>143</sup> The adversarial approach has always been to view property offenses and offenses of violence committed by those

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141. The claims that problem solving courts have the effect of reducing recidivism are sometimes questioned or even denied, but there are credible reports in the literature of these successes. *See generally* Nigel Stobbs & Geraldine Mackenzie, *supra* note 14 (conducting a meta-analysis of the relationship of Indigenous sentencing courts to recidivism and attendance rates). As to the proliferation of problem solving courts, the latest incarnation seems to be the rise of Gambling Treatment Courts in many American jurisdictions. Corey D. Hinshaw, *Taking a Gamble: Applying Therapeutic Jurisprudence to Compulsive Gambling and Establishing Gambling Treatment Courts*, 9 GAMING L. REV. 333, 333–34 (2005).

142. A sentencing judge in a mainstream court is hardly likely to invite the prosecution, defense lawyer and offender to join with the judge as a team in seeking to treat the cause of the offending behavior and agree to meet regularly to review progress. Although just that approach is possible (especially with enactment of enabling legislation such as the *Drug Court Act 2000* (Qld.) (Aust.)) it is generally restricted to specifically convened courts. *Drug Court Act 2000* (Qld.) s 18 (Aust.), for example, provides that a Drug Court Magistrate may make an intensive drug rehabilitation order, and that option would not be open to a magistrate in a mainstream Australian court.

143. Fleur Beaupert et al., *Mental Health Tribunals: Therapeutic Jurisprudence Implications of Weighing Fairness, Freedom, Protection and Treatment*, 17 J. JUD. ADMIN. 46, 50–52 (2007); Kate Diesfeld & Brian McKenna, *The Unintended Impact of the Therapeutic Intentions of the New Zealand Mental Health Review Tribunal: Therapeutic Jurisprudence Perspectives*, 14 LAW & MED. 566, 567–68 (2007).

with drug addictions primarily as anti-social behavior which needs to be addressed judicially by way of deterrence and punishment. While most jurisdictions have long allowed a sentencing judge to include components of rehabilitation in a sentence, this sentencing purpose has traditionally been drastically under-resourced, arguably pursuant to a more punitive and positivist worldview which treats offenders as simplistic and two-dimensional moral subjects.

There is certainly a strong Kantian tradition which informs and infects the adversarial worldview. Morality, as it concerns transactions between rational agents, is at the heart of the doctrine of *mens rea*, which generally holds that a person is morally and legally responsible for her actions so long as she knows what it is that she is doing and her choices are deliberate. Modern criminological and mental health research shows, of course, that the role of rational choice in offending is much less important than traditionally believed, and much less so in the case of those whose offending is related to pathology, such as those who are drug addicted.<sup>144</sup>

Evidence of the express acceptance of submissions based on therapeutic jurisprudence principles is not hard to find in superior mainstream Australian courts. For example, in the New South Wales Court of Appeal, the full bench expressly acknowledged the validity of an argument appealing the severity of a criminal sentence from therapeutic jurisprudence principles. Justice Charles of the Supreme Court of Victoria

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144. Rachel A. Hill, *Character, Choice, and "Aberrant Behavior": Aligning Criminal Sentencing with Concepts of Moral Blame*, 65 U. CHI. L. REV. 975, 975–76 (1998); Ray Paternoster & Greg Pogarsky, *Rational Choice, Agency and Thoughtfully Reflective Decision Making: The Short and Long-Term Consequences of Making Good Choices*, 25 J. QUANTITATIVE CRIM. 103, 103–07 (2009). Notions of human agency are a prominent part of many criminological theories. Rational choice theory arose out of the positivist tradition which reduces offending behavior to a set of observable internal and external factors and suggests that criminal conduct can be regulated, managed and reduced by, *inter alia*, careful design of the physical environment—such as playing of classical music in shopping centers to discourage loitering or improving street lighting to discourage car theft. Contemporary theories of critical criminology have long since abandoned the positivist conceptions of crime and, by implication, the naïve liberal worldviews which inform it. Being a highly conservative discipline, the law appears to be quite slow in keeping abreast of changes in criminological theory and scholarship. For example, it would take quite an effort to convince the judiciary and the legislature to consider the implications of work in contemporary postmodern philosophy and Lacanian psychoanalysis, as they impact modern hybrid criminological theories which seek to explain how the dynamic tension between inclusion and exclusion prolongs the narcissistic subject throughout the life-course in an aggressive struggle for identities of social distinction expressed by the acquisition and display of consumer culture's status-symbols. Fining a juvenile for shoplifting on the basis that he is a free moral agent living in a liberal world would seem less fraught. CRAIG ANCRUM ET AL., *CRIMINAL IDENTITIES AND CONSUMER CULTURE* 191–217 (2008).

(with whom the rest of the bench concurred) acknowledged the force of the arguments by counsel of:

[T]he need to “break the cycle of recidivism” and the dangers of institutionalisation. It was submitted that it was within the judge’s sentencing discretion to extend a degree of leniency to Uren to maximize the prospect of rehabilitation by attempting to halt the process of institutionalisation. Mr Tehan next submitted that the judge’s approach reflected principles developed in the growing body of literature dealing with “therapeutic jurisprudence” and argued that there is emerging empirical evidence that offenders can be rehabilitated where appropriate rehabilitation programmes are combined with an approach to sentencing by judges that supports rather than undermines the rehabilitation process. He argued that modern research suggests that punitive sentencing measures do not reduce recidivism. Next, he submitted that even if the Court found that there was manifest inadequacy in sentence, the Court retained the discretion to decline to interfere with a sentence even though manifest inadequacy has been shown.<sup>145</sup>

So the assertion here is that instances of both academic and judicial opinions hold that therapeutic jurisprudence can provide exemplars for the resolution of problems which the prevailing adversarial paradigm cannot. This is evidence of a disciplinary crisis in the Kuhnian sense.

Sometimes an argument that the new paradigm is neater, simpler, or more streamlined can be influential, even if the new paradigm is only marginally better than the former at predicting or explaining. Kuhn claimed that the subjective and aesthetic considerations are important. Identifying and explaining a paradigm shift while it is in progress is usually impossible and it is not until after it has been accepted, tested, and applied that the most decisive arguments are developed.<sup>146</sup> While the shift is occurring, opponents claim that the new paradigm is popular because of some initial success and that it is really just a novel sort of “lens” with which to help diagnose and fix problems within the existing paradigm. Given the convoluted and reactive development of the adversarial paradigm over several centuries, it is unsurprising that it lacks structural and theoretical clarity and precision. Attempts to retain the threads of adversarialism in areas which the law is experiencing important and

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145. DPP v Stone [2003] VSCA 208 ¶ 18 (Austl.).

146. KUHN, SCIENTIFIC REVOLUTIONS, *supra* note 1, at 153.

successful evolutionary growth only exacerbate this structural messiness. In assessing the inability of the adversarial system to cope with post-enlightenment worldviews and to make best of use of the enormous body of social science data now available to us, Menkel-Meadow suggests that:

Binary, oppositional presentations of facts in dispute are not the best way for us to learn the truth; polarized debate distorts the truth, leaves out important information, simplifies complexity, and obfuscates rather than clarifies. More significantly some matters . . . are not susceptible to a binary (i.e. right/wrong, win/lose) conclusion or solution. The inability to reach a binary resolution of these disputes may result because in some cases we cannot determine the facts. . . . Courts, with what I have called their “limited remedial imaginations,” may not be the best institutional settings for resolving some of the disputes that we continue to put before them.<sup>147</sup>

It is virtually canon in the relevant literature to conceive of and label therapeutic jurisprudence as a “lens.” We ought not to confuse different conceptions of what a “lens” might be in relation to competing juristic paradigms. Daicoff has attempted to identify and explicate what a number of alternative approaches to the adversarial practice of law have in common.<sup>148</sup> She analyzes new approaches and emerging paradigms which eschew the “overly adversarial, other-blaming, position-taking” tradition with which we are all familiar.<sup>149</sup> Further, she suggests that these new “vectors”<sup>150</sup> are all based on the assumptions that: (1) law ought to optimize the psychological wellbeing of all those involved in it and (2) law ought to be concerned with a wider set of rights than just strict legal rights.<sup>151</sup>

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147. Menkel-Meadow, *supra* note 121, at 6 (footnotes omitted). Even if we were not to subscribe to the postmodern theoretical perspective from which the author of that paper is obviously arguing, the observation is still compelling.

148. *Law as a Healing Profession: The “Comprehensive Law Movement”* is Daicoff’s most recent and comprehensive contribution to the field, although she has been analyzing these approaches since at least 2000, and she claims that these approaches were merging and synergizing as early as 1997. Daicoff, *supra* note 66, at 1.

149. Susan Daicoff, *The Comprehensive Law Movement: An Emerging Approach to Legal Problems*, 49 SCANDINAVIAN STUDIES IN LAW 109, 110 (2006).

150. Daicoff, *supra* note 66, at 3 (“The term ‘vectors’ reflects the forward movement of the disciplines into the future and their convergence toward common goals.”).

151. *Id.* at 1–2. The approaches she identifies as informing the Comprehensive Law Movement include: Collaborative Law, Creative Problem Solving, Holistic Justice, Preventive Law, Problem Solving Courts, Procedural Justice, Restorative Justice, Therapeutic Jurisprudence, and Transformative mediation.

Daicoff claims that these new approaches represent a new juristic paradigm (although she does not use that term) which is an inevitable response to what she calls the tripartite crisis in the legal profession: poor public confidence in the law, stress and depression amongst lawyers, and decreasing professional standards.<sup>152</sup> The movement is comprehensive in that it is interdisciplinary, integrated, humanistic, restorative, and therapeutic. Each vector recognizes that it is a function of law to act as an agent for positive interpersonal or individual change in some way. Each also emphasizes “rights plus” as a legitimate concern of legal processes.

This consideration of non-legal factors in the resolution of a dispute or the administration of justice is antithetical to current practice in law schools. Students are required to recognize and disregard factors which do not contribute to a legal decision and the ability to do this well generally makes a “good” student and ultimately a “good” lawyer or judge.

Daicoff goes much further in proposing paradigm status for a juristic model that includes therapeutic jurisprudence than virtually any other contributor to the literature. She claims that the lenses and vectors of the Comprehensive Law Movement are all consistent with “a different paradigm for the resolution of legal matters.”<sup>153</sup> She then links the assertion of an emergent new legal paradigm to paradigmatic changes in wider political and social institutions, mainly by reference and analogy to work done by feminist legal academics and researchers of post-enlightenment developments in law and society. Her analysis in this regard is closely linked with the requirement of a changed worldview as a basis for a Kuhnian paradigm shift. She makes the quite sanguine claim that a reshaped geopolitical world characterized by globalization and a less adversarial international political mentality as a result of the end of the Cold War “have contributed to a growing societal awareness of our ‘connectedness’ to, and an open mindedness towards, all people, all countries, and all cultures in the world.”<sup>154</sup>

This trend among researchers to point to the link between changing worldviews and a need for a changed juristic paradigm is quite common. It is precisely what would be expected of a discipline that is experiencing an increasing number of anomalies, experiencing an increasing inability to

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152. Which she says include “Rambo style litigation” and ethically questionable conduct. SUSAN DAICOFF, *LAWYER, KNOW THYSELF: A PSYCHOLOGICAL ANALYSIS OF PERSONALITY STRENGTHS AND WEAKNESSES* 4 (2004). Daicoff is also a psychologist and has written a seminal work on the links between the typical lawyer personality and the problems in the profession.

153. Daicoff, *supra* note 66, at 10.

154. *Id.* at 39.

solve puzzles in its application, and entering into a period of crisis or revolution. The desire of those who resist a paradigm change to justify resistance on the basis of incompatibility of alternative paradigms with constitutional requirements and due process is surely reflective of a rapidly disappearing positivist, and predominantly pragmatist, worldview.<sup>155</sup> It seems that even when the relevant academic literature does not explicitly discuss incommensurability, practitioners and other stakeholders sense it looming.

#### VI. ARE ADVERSARIALISM AND THERAPEUTIC JURISPRUDENCE COMPETING PARADIGMS?

Kuhn claimed that paradigm debates are not really concerned with the current relative problem solving strengths of each paradigm but more with which paradigm is more likely to resolve future problems. In that sense, these debates have an element of faith to them.<sup>156</sup> He says that a paradigm's success requires some advocates and practitioners who have both faith and the ability to apply it and who take the risk of it being wrong. Many initial supporters of the paradigm may be attracted to it for the wrong reasons.<sup>157</sup> But the longer it refuses to go away and the more critical mass it accumulates, the more likely it is to prevail. A practitioner who resists the new paradigm once it has been accepted is not necessarily unreasonable or illogical; he simply is not a practitioner of that profession anymore. This is, of course, not an implication that practitioners and advocates of therapeutic jurisprudence may want to embrace or articulate bluntly if they hope to see a paradigm shift.

The tipping point for a paradigm shift does not necessarily occur when a particular amount of evidence or proof has been generated. Acceptance and application by a body of stakeholders who are schooled in the new

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155. Compare Anthony Mason, Address at the 17th Australasian Institute of Judicial Administration Annual Conference: The Future of Adversarial Justice (Aug. 7, 1999) (“[c]ourt adjudication in civil cases is essential for the regulation of acts and transactions, in particular for the protection of commercial transactions and economic activity. The vitality of commercial life depends upon judicial enforcement of contractual rights and obligations . . .”), with Freiberg, *Non-Adversarial Approaches to Criminal Justice*, *supra* note 65, and KING ET AL., *supra* note 124, at 11–12 (“[The adversarial system’s] suitability for a post-modern, multicultural world has been questioned and the alternative paradigm of ‘non-adversarial justice’ represents both a reaction to some of the less desirable features of adversarialism and positive contributions from other professions, jurisdictions and disciplines to the task of dispute resolution and problem-solving.”) (internal citations omitted) (attributing this idea to Daicoff).

156. KUHN, *SCIENTIFIC REVOLUTIONS*, *supra* note 1, at 160–73.

157. See generally Freckleton, *supra* note 70 (suggesting a list of these potential wrong reasons in relation to therapeutic jurisprudence).

paradigm is necessary.<sup>158</sup> Kuhn asserted that the transfer of allegiance from one paradigm to another is a “conversion experience that cannot be forced.”<sup>159</sup> Lawyers and judges who have spent long careers working within the adversarial paradigm may well resist the assertion that a therapeutic paradigm is required—not based on some belief that specialist courts do not work but based on the belief that these courts are merely variations within the adversarial system such that all problems can be dealt with by the adversarial courts.

As for the current nature of the debate between adherents of adversarialism and those proposing a therapeutic jurisprudence approach, it is difficult to precisely identify advocates for a strong adversarialism. On the surface of the literature, there is almost an absence of debate between the two conceptual areas,<sup>160</sup> but this may well be due to a reluctance to be identified too strongly with the more radical element of either perspective. There are, of course, those who vigorously criticize therapeutic jurisprudence and, in their active resistance of the adoption of therapeutic jurisprudence principles, the paradigm debate can be identified. Since academics, judges, and practitioners advocating both paradigms are intelligent and articulate people, it should be relatively easy for members of either group to understand what members of the other group are suggesting. Still, the absence of much significant theoretical—as opposed to doctrinal—debate in the literature may indicate a lack of willingness to engage.

Therapeutic jurisprudence advocates often seem to publish relatively lucid explanations of their core beliefs and hypotheses. However, fairly consistent responses designed to stop conversation seem to be that these beliefs and hypotheses either are too vague and simplistic or issue blanket statements that therapeutic jurisprudence assertions are contrary to due process or impermissibly paternalistic.<sup>161</sup> Conversely, critics of the

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158. Max Planck observed that “[a] new scientific truth does not triumph by convincing its opponents and making them see the light, but rather because its opponents eventually die, and a new generation grows up that is familiar with it.” MAX PLANCK, *SCIENTIFIC AUTOBIOGRAPHY AND OTHER PAPERS* 33–34 (Frank Gaynor trans., 1949). The traction which therapeutic jurisprudence and nonadversarial approaches to law is gaining in law school curricula is well documented. *See generally* David Wexler & Bruce Winick, *The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law Clinic*, 13 *CLINICAL L. REV.* 605 (2006).

159. KUHN, *SCIENTIFIC REVOLUTIONS*, *supra* note 1, at 151.

160. Some advocate for the clear primacy of each paradigm. *See generally* Satin, *supra* note 130; Mason *supra* note 161.

161. *See* Bruce A. Arrigo, *The Ethics of Therapeutic Jurisprudence: A Critical and Theoretical Enquiry of Law, Psychology and Crime*, 11 *PSYCHIATRY, PSYCHOL. AND L.* 23, 24 (2004); Eric Cohen, *The Drug Court Revolution: Do We Want Theory Rather than Justice to Become the Basis of Our Legal System?*, *THE WEEKLY STANDARD*, Dec. 27, 1999, at 20; Hoffman, *supra* note 48, at 2071; *see*



adversarial paradigm are prone to fixate on certain weaknesses in the current system of litigation and conclude that, on the basis of those weaknesses, the entire adversarial paradigm is terminal.<sup>162</sup> Such polarizing views are perhaps evidence that we really are dealing with competing paradigms, but have not so far led to a productively theoretical discourse. A major aim of this Article is to promote and inform such discourse. If we grant that a research community—intrinsically linked to a specialist profession—consists of the practitioners of a specialty (who are bound together by common elements in their education and apprenticeship and consider themselves responsible for the pursuit of a set of shared goals), communication within that community should not be characterized by blinkered misunderstandings and vague generalizations.

As discussed above, the obvious pragmatic conservatism in the practice of law is clearly reflected in the theoretical adversarial paradigm. The adversarial system operates pursuant to an often tacit assumption that there is a legal solution to every dispute, request for judicial adjudication, or determination brought before it. The system cannot be seen as unable to deal with any particular fact situation, however novel or intractable it may seem. To allow that the law cannot solve a problem which it is expected to deal with is to raise the ugly specter of the “pulling-one-thread argument.” In such an argument, the anomaly is then reproduced for similar fact scenarios where both the core of legal principle, and public confidence in the administration of efficient, objective, and infallible justice are undermined. The overwhelming focus on rules and the perpetuation of the assumption or myth that they are derived from necessary and core theoretical principles is both the great strength and weakness of the adversarial system. It is a strength in that it promotes certainty and confidence; and it is a weakness in that it discourages divergent views or critique. An overemphasis on the certainty of outcome, which an adversarial trial or hearing is supposed to provide, ignores the aggregating

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generally David Carson, *Therapeutic Jurisprudence and Adversarial Injustice: Questioning Limits*, 4 W. CRIMINOLOGY REV. 124 (2003); Arthur Christean, *Therapeutic Jurisprudence: Embracing a Tainted Ideal*, Sutherland Institute, Sept. 2001, available at <http://psychrights.org/articles/TherapeuticJurisprudenceTaintedIdeal.htm>; Anthony Mason, *The Courts as Community Institutions*, 9 PUB. L. REV. 83 (1998); Mason, *supra* note 155; Krumholz & Roderick, *supra* note 39; Christopher Slobogin, *Therapeutic Jurisprudence: Five Dilemmas to Ponder*, 1 PSYCHOL. PUB. POL’Y & L. 193 (1995).

162. Freiberg, *supra* note 13, at 221; Menkel-Meadow, *supra* note 121, at 14; Padma Raman, *Towards a 21st Century Legal System*, 76 AUS. L. REFORM COMM’N 19, 20 (2000); Satin, *supra* note 130.

body of data which shows that many legal processes and aspirations do not work.<sup>163</sup>

There have been strong words of caution against excessive “diddling” with adversarialism at the highest judicial levels, which betray some cross-jurisdictional tensions. Former Chief Justice of the High Court of Australia Sir Anthony Mason asks, for instance, whether a litigation or court system which places only secondary emphasis on the process of adjudication (either as an option of last resort or just one alternative) can be constitutionally valid:

Have we come so far that we can now say that, in Australia, trials are “a mechanism of valued but last resort”? Whatever be the position in Canada, I do not think that we can make a similar statement for Australia. Nor should we. Such a statement seems to suggest that court adjudication is simply a back-stop to be invoked when all other expedients fail. That suggestion is scarcely consistent with the separation of powers and the vesting by the Australian Constitution of federal judicial power in Ch III courts. One can understand the view that other modes of dispute resolution are incidental to the exercise of judicial power, though there are difficulties in making good that proposition. But to treat court adjudication as if it is *something less than the main game*, in the context of Ch III courts under the Constitution, is to turn constitutional tradition on its head.<sup>164</sup>

Mason again betrays an attitude that a forum or tribunal which does something other than adjudicate must be somehow inferior by stating that “[c]ourts are courts; they are not general service providers who cater for ‘clients’ or ‘customers’ rather than litigants. And if courts describe themselves otherwise than as courts, they run the risk that their ‘clients’ and their ‘customers’ will regard them . . . as something inferior to a court.”<sup>165</sup>

This positing of adversarial trial courts as ultimately the “main game,” as constitutionally sacrosanct, and as “superior” to other modes of judicial functioning is surely illustrative of the apprehension that the innovations of therapeutic jurisprudence are not just tinkering at the edges of law; and

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163. Such as the mounting evidence that imprisonment does not rehabilitate offenders or reduce recidivism rates, or that the issuing of domestic violence orders does not reduce the incidence of family violence, or that increasing penalties does not deter crime.

164. Mason, *supra* note 155 (emphasis added).

165. *Id.*

it is an acknowledgement that the paradigm is under threat. As we saw above, Kuhn holds that the perceptions of those working within a discipline as crucial to the status of a paradigm—at least as crucial as the empirical and analytical results of current processes within the paradigm.

If we were to grant that adversarialism and therapeutic jurisprudence are both paradigmatic jurisprudential models and that they are incommensurable, then what is the current state of that incommensurability? Is the adversarial paradigm, in fact, in crisis? Or, have we perhaps even approached a state of disciplinary revolution in that the growing list of anomalies in our legal and judicial systems indicate a system which is better described and explained by something other than an adversarial core?

Worldviews change slowly and incrementally, as do disciplinary paradigms. The neo-liberal worldview<sup>166</sup> is pervasive in the political, economic, and social life of the Western democracies to the extent that some social scientists claim that we have reached “the end of history.” Political economist Francis Fukuyama notoriously claims that “we may be witnessing . . . the end of history as such: that is, the end point of mankind’s ideological evolution and the universalization of Western liberal democracy as the final form of human government.”<sup>167</sup>

This sort of fundamentalist hubris, which makes explicit claims linking a neo-liberal political paradigm with the natural order, obviously appeals to the conservative thread in law and jurisprudence. In fact, the very nature of a written constitution guarantees that the relationship is reciprocal, that is, that law is linked to the liberal worldview in the very coercive fabric of the Rule of Law.

Kagan has examined this link in some analytical depth, studying the extent to which an adversarial culture is ingrained in American social and political history and claiming that: “[T]he rhetoric of law is deeply rooted in American consciousness, and has been so embedded since the founding

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166. The neoliberal worldview can generally be categorized as the idea that material prosperity, economic growth, and social wellbeing are best achieved through the actions of individuals pursuing their self-interest within freely functioning markets. Interestingly enough, there would seem to be some evidence that this neo-liberal paradigm is currently in a state of crisis as a result of the global financial crisis of 2009. Governments in the liberal democracies appear much more willing to intervene in the markets and to regulate them, in order to try to prevent dysfunction and repair fundamental problems rather than to punish individual transgressions by corporations. This might, to some extent, be related to the phenomenon of the problem solving courts, where judges are far more interventionist and managerial than they would be the case in a mainstream court informed by traditional liberal principles, in an attempt to resolve the causes of offending and to identify and repair dysfunction.

167. Francis Fukuyama, *The End of History?*, 16 THE NATIONAL INTEREST 3, 18 (1989).

of the country, as captured by John Adam's oft quoted description of the American polity as a 'government of law, not of men.'<sup>168</sup>

Kagan identifies the roots of adversarial legalism as the formal and conservative protocols which make necessary a reliance on adversarial legal weapons. This is at the expense of alternatives which may well provide a simpler and cheaper alternative. He claims not that the prevailing political culture explicitly focuses citizens toward adversarial legalism, but that it denies citizens other remedies or mechanisms for influence or policy implementation. He asserts that the current political culture "demands comprehensive government protections . . . [while at the same time] mistrust[ing] government power [resulting in] fragment[ed] political authority [that must be held] accountable through lawsuits and judicial review."<sup>169</sup> This does sound significantly comparable to the style of administrative law and of government regulation in many common law jurisdictions. The exponential growth of the tribunal system as a means of obtaining redress against public authorities is some evidence of this increasing reliance on sanctions among regulatory bodies.<sup>170</sup>

The overall role of the adversarial trial is not just to pick a winner or give legal resolution to a dispute. For example, it serves some symbolic and cathartic functions, reducing stresses and tensions in a community or group through demonstrations and communications of justice being done. The important ritual nature of the adversarial trial, based on the relevant cultural norms of the particular jurisdiction, is perhaps best reflected in the use of juries in Western liberal democracies and common law countries.<sup>171</sup>

What would be necessary for actual paradigmatic change in terms of constitutional principles, law, and legal and judicial ethics is beyond the scope of this Article.

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168. Herbert M. Kritzer, *American Adversarialism*, 38 L. & SOC. REV. 349, 349–50 (reviewing Robert Kagan's book *Adversarial Legalism: The American Way of Law*); ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 18 (2001) (using the term legalism to refer to the particular style of "policymaking, policy implementation, and dispute resolution by means of lawyer-dominated litigation" that is prevalent in the United States).

169. *Id.* at 35.

170. There is quite a bit of empirical support for this in Kagan's research. He finds that regulatory authorities and public interest matters are much more like to be collaborative in the civil law jurisdictions than in those with an adversarial system of law evolving from the Westminster system. *Id.* at 35–36.

171. Coke suggested that the legitimacy conferred on a trial by the use of a jury was that "[t]he law delighteth herself in the number twelve . . . that number twelve is much respected in Holy Writ, as in twelve apostles, twelve stones, twelve tribes." Piyel Haldar, *Words with the Shaman: On the Sacrifice in Criminal Evidence*, in *CRIMINAL LEGAL DOCTRINE* (Shaun McVeigh et al. eds., 1997) (quoting Coke).

In order for therapeutic jurisprudence to prosper and to influence the wider juristic model, rather than to be limited to what Freiberg earlier referred to as “pragmatic instrumentalism,” it needs to be perceived as at least informing an alternative and coherent paradigm, regardless of whether it is a standalone paradigm. The major theoretical risk of denying it such status is that its core messages will be lost.<sup>172</sup> Legal theory and jurisprudential principle arising within the adversarial paradigm take some key concepts and principles as so connected to the core of principle that they are unassailable, and therefore assumed. If the paradigm itself is left unchallenged, then the focus of legal scholars, theorists, and reformers will be predominantly on further defining and refining those concepts which are taken for granted (such as “rights,” “property,” “due process,” “ownership,” “criminal responsibility,” etc.). Historically, the most legally influential writings of jurists are doctrinal analyses or “analytical jurisprudence.” Greater citation of research and writing related to therapeutic jurisprudence would be further evidence of an emerging shift.

It appears that the trappings of adversarialism are being continually pared back so that we ought to see manifested in what is left, in the work of the courts and in lawyers’ offices, the absolute core principles which have been definitive of the paradigm: they will give us a clue as to when the paradigm is actually in flux.

## VII. CONCLUSION

Although many academic works use the concept of “paradigm shift” and often cite Kuhn as some sort of license for the author’s revisionism,<sup>173</sup> there is no doubt that the language and conceptual framework of the Kuhnian paradigm shift is an invaluable way to conceive of the relationship between differing worldviews and methodological frameworks within a professional and academic discipline.

The value of the Kuhnian conception of the paradigm to the therapeutic jurisprudence movement is not that it provides any “algorithm for theory choice,” but that it greatly assists in framing the extent of the tension between two significantly different juristic models. Only if that tension is properly framed and contextualized can we then explore the ways in which the tension can be resolved. The thrust of this Article is that the tension

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172. It may be that some therapeutic jurisprudence advocates are insufficiently aware of this risk.

173. Loving and Cobern suggest that this may explain why they frequently found Kuhn cited on page one or in the first few paragraphs of a book or article. *See generally* Cobern & Loving, *supra* note 15.

constitutes the interplay of two competing paradigms. This means that we are unlikely to see some blended model of court system in which some courts operate according to purely adversarial principles and some according to predominantly therapeutic jurisprudence principles. If, as this article posits, therapeutic jurisprudence or some nonadversarial amalgam is positioning to replace adversarialism, then some core elements of the adversarial paradigm will be replaced.

So the minimum development we are likely to see in coming years is that adversarialism and therapeutic jurisprudence do not have a common language or reference point. For that reason, as Kuhn would suggest, there is no point in therapeutic jurisprudence advocates attempting to “convert” adversarialists or those with strong ideological objections. If shift is to occur, therapeutic jurisprudence will indoctrinate the future generation of jurists in its theory and methods.

Jurists need to recognize that the law is emerging from a very long period of normal science and entering a time of crisis. Far from spending their time questioning the limits or validity of their paradigm, most practitioners during a period of normal science are actually trying to force nature to fit their paradigm—and if that were not the case, most of the routine functions of the discipline could not occur.